No. 86-169

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

HAROLD J. DES VIGNES,

Petitioner,

against

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented.

1. Is Federal Rule of Appellate Procedure 38 authorizing the imposition of punishment for the filing of "frivolous" appeals unconstitutionally vague for failing to establish standards to determine "frivolity"?

2. Were the petitioner's due process rights infringed by case consolidation and application of the lead case procedure?

3. What standards should be applied in determining whether an appeal is frivolous under Federal Rule of Appellate Procedure 38?

4. Was the petitioner's appeal "frivolous?"

(Note: Petitioner reserves the right to argue Question 4 in the event certiorari is granted on any or all of Questions 1-3 but does not include Question 4 among the reasons for granting certiorari.)

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986.

HAROLD J. DES VIGNES,

Petitioner,

against

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI.

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above entitled proceeding on May 2, 1986.

Opinions Below.

The opinions below are all reprinted in the appendix to this petition at the pages indicated below:

Court	Subject & Date of Opinion	Appendix Page
Federal Circuit Court of Appeals ("FCCA")	Decision awarding $1,000. costs and attorneys fees to Dept. of Justice—5/2/86	A-1*
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United States Supreme Court ("USSC")	Decision denying stay of FCCA judgment dated 5/2/86 pending *certiorari* consideration—6/30/86	E-1

*Appendix pages are referred to by letter and number. Thus A1 refers to Page 1 in Appendix A.

Jurisdiction.

The petitioner initially sought review of the Department of Transportation, Federal Aviation Administration's ("FAA") decision to terminate his employment before the United States Merit Systems Protection Board ("MSPB") pursuant to 5 U.S.C. §§ 7511-7513, and 5 CFR §752.405(a).

After MSPB affirmance of the FAA's decision to discharge the petitioner, the petitioner sought review of the MSPB decision in the Federal Circuit Court of Appeals ("FCCA") pursuant to 5 U.S.C. §7703(c), and 28 U.S.C. §1295(a)(9).

By decision dated May 2, 1986 (Appendix A) and judgment of the same date (Appendix B) the FCCA affirmed the MSPB's decision to sustain the petitioner's discharge. In the same decision the FCCA fined Jack B. Solerwitz, petitioner's counsel, $1,000.00 under FRAP Rule 38 for "filing and maintaining" a frivolous appeal. (*id.*)

The jurisdiction of this Court to review the judgment of the Federal Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

Statutes Involved.

Federal Rule of Appellate Procedure 38.

Damages for Delay.

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Civil Service Reform Act ("CSRA") §7513 (Cause and Procedure) 5 U.S.C. §7513(b).

> "An employee against whom an action is proposed is entitled to" . . .
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> (3) be represented by an attorney or other representative;
>
> and
>
> (4) a written decision and the specific reason therefor at the earliest practicable date.
>
> . . .
>
> (d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title [5 USCS 7701].
>
> (e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter [5 USCS §§ 7511 *et seq.*], *together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.*

(Added Oct. 13, 1978, P. L. 95-454, Title II, §204(a), 92 Stat. 1136.)

[emphasis added]

CSRA §7703 [Judicial Review of Decisions of the Merit Systems Protection Board] 5 USC §7703.

(a)(1) "Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision."

. . .

(c) In any case filed in the Court of Appeals for the Federal Circuit, *the court shall review the record* and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

Statement of the Case.

A. Background Before Solerwitz's Representation of Petitioner.

(1) Proceedings Before the FAA.

Petitioner is a former Air Traffic Controller ("ATC") who had *12 years* of satisfactory job experience with the Federal Aviation Administration ("FAA") before he was discharged in August 1981 from the Houston Air Route Traffic Control Center for his alleged four day participation* in a strike called by the Professional Air Traffic Controller's Organization ("PATCO") which began on August 3, 1981. (F4, F17). When discharged, petitioner was a non-probationary employee in the competitive civil service of the federal government. (G2, G34). If the PATCO strike continued through August 6, 1981, petitioner lost a job he held for *twelve years* by allegedly being absent from work for *2 days.*

The PATCO strike effected approximately 12,700 ATCs at geographically diverse locations throughout the Continental United States, Alaska, and Hawaii.

The circumstances surrounding each of the petitioner's discharges were different. At different air traffic control centers the FAA employed different procedures when discharging the ATCs. Not all ATCs agreed with or supported the strike. Some ATCs were not scheduled to work during the strike. Some ATCs were on official leave approved by their superiors during the strike. Some ATCs wanted to return to work following President Reagan's

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*August 5, 6, 7, and 8, 1981 were the days the petitioner allegedly struck. MSPB Presiding official Kelleher's decision indicates evidence existed to show the PATCO strike ended on August 6, 1981 including President Reagan's August 3, 1981 announcement that air traffic controllers who did not report to work by August 5, 1981 would be fired, and Secretary of Transportation Drew Lewis' announcement that as of 11:00 AM on August 5, 1981 the strike was over (G7). If the PATCO strike continued through August 6, 1981, petitioner lost a job he held for *twelve years* by allegedly being absent from work for *two days*.

August 3, 1981 telecast from the White House Rose Garden directing them to return to work but were unable to do so because they were locked out of their air traffic control stations by the FAA.

PATCO's attorney, Richard J. Leighton, of Washington, D.C., initially advised PATCO's leadership that the federal government would *not* discharge all traffic controllers in the event of a nationwide strike. After his advice proved wrong, Leighton undertook representation of many ATCs whose jobs were terminated, including the petitioner.

Following the PATCO strike, the FAA sent *individual* air traffic controllers adverse action notices proposing their removal for their alleged participation in a strike, and their absence without official leave (AWOL) pursuant to 5 U.S.C. §7513(b).

Individual ATCs filed *separate* responses in opposition to the proposed notice of removal pursuant to 5 U.S.C. §7513(b). They were mailed *separate* notices of termination by the FAA. And they filed *separate* timely appeals of their removal action to the MSPB under 5 U.S.C. §7513(d) and §7701.

By letter dated August 8, 1981, the FAA notified petitioner DesVignes of its intent to discharge him for (1) striking against the United States government in violation of 5 U.S.C. §7311 between August 5, 1981 and August 8, 1981, and (2) being AWOL during the same time period (F4). The August 8, 1981 letter notified the petitioner that he had "*seven* calendar days" to reply to the notice "personally, in writing, or both, and furnish affidavits and

other documentary evidence in support of your answer . . ." (F5).

Petitioner's response to the FAA dated August 15, 1981 requested (1) an extension of time to file a written response to the charges contained in the FAA letter dated August 8, 1981, (2) a copy of all material relied upon by the FAA to support its action, and (3) an opportunity to make an oral presentation in his defense before being required to file a written response to the FAA charges (F7).

Petitioner also made a Freedom of Information Act request seeking documents and other information essential to his defense from the FAA (F9).

By letter dated August 15, 1981 the FAA (1) denied petitioner's request for an extension of time within which to file a reply, (2) granted petitioner's request for an oral presentation of his defense *within the 7 day time period for reply,* and (3) provided the petitioner with *a portion of the material the petitioner deemed essential* to make his defense (F11).

Petitioner's letter to the FAA dated August 17, 1981 indicated that he could *not* respond to the FAA's charges unless he obtained the information requested in his letter dated August 15, 1981 (F13).

The FAA responded to "Material Issues Raised by Appellant" in a *form* document (F15).

By letter dated August 21, 1986 the FAA advised petitioner of its decision to discharge him effective August 24, 1981 (F17).

2. *Proceedings Before the MSPB*

Petitioner appealed the FAA's decision to the Merit Systems Protection Board (MSPB). Petitioner's case was consolidated with those of other ATCs. On January 3, 1983 petitioner's case was decided by MSPB Presiding Official Kelleher under the consolidated case titled *Block v. FAA*, ____ MSPB ____ (Docket No. DA075281FO892, 1/3/83) (*Appendix G* to this petition is a copy of the *Block* decision).

In *Block* Presiding Official Kelleher decided:

1. The MSPB did *not* have jurisdiction to consider each appellant's claim that he was *unlawfully suspended during the notice period of the removal actions* since the initial petitions on appeal did not raise this issue* (G2-G4).

2. "Ten [unnamed] appellants . . . were charged with participating in a strike on dates subsequent to August 6, 1981" . . ., and *all appellants* were held to the finding that the PATCO strike continued until "August 16, 1981".**

3. Petitioner DesVignes would have been allowed to return to work within the deadline established by the President, although no specific reference to the record regarding DesVignes was given (G11-G14).

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*This conclusion was based upon an incorrect interpretation of the word "claim" in 5 C.F.R. §1201.24 (a)(9)(1982) as *not* to include the petitioners' *claims* that they were unlawfully suspended.

**G7-11, G12. Presiding Official Kelleher's decision made *no mention* of the specific facts involving Petitioner DesVignes alleged strike participation (G1-G35). Nevertheless, Petitioner DesVignes' removal was sustained upon generalizations the Presiding Official held applicable to DesVignes without referring to the record. [*id.*] DesVignes' discharge was, therefore, *not based upon* evidence in the record showing the unique circumstances regarding his alleged participation in the strike.

4. Only Petitioner Stout had presented any evidence that he was locked out, fired, or prevented from reporting to work by the agency after 11 a.m. on August 5, 1981 (G14-G17).

5. The FAA's revocation of ATCs' annual leave contractually guaranteed in the ATCs' collective bargaining agreement was lawful since the "operational emergency" recognized in the collective bargaining agreement as a condition under which general leave could be revoked could be *inferred by the MSPB* after the fact even though a formal declaration of "operational emergency" was *not* made *during the strike* (G17-G20).

6. Defendant's right to make an oral reply to the charge of strike participation under 5 USC §7513(b)(2) was *not denied* since the FAA had given the ATCs notice that they could file a written or oral reply within 7 days of receipt of the notice of proposed renewal (G24-G26).*

7. Shortening the reply period for petitioners to respond to charges they were on strike as specified in 5 USC §7513(b)(2) is *not* grounds for reversal of petitioners cases unless it is also shown that harmful error resulted therefrom (G25-G29).

8. Illegal suspensions during the notice period prior to when the petitioners were required to come back to work had no impact "upon the decision to remove them" (G30-G31).**

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*The fact the FAA could not practically have afforded each ATC an oral hearing within 7 days of service of the notice of proposed removal was *not* consideed in Presiding Official Kelleher's decision.

**This holding ignores the fact that petitioners who were illegally suspended *before* the deadline shift when they were required to return to work or lose their jobs were unable to be at work as a result of FAA action beyond their control.

Petitioner DesVignes filed a Petition for Review of Presiding Official Kelleher's decision with the MSPB which came before it in the consolidated case *Alex v. Dept. of Transp., FAA* 17 MSPR 479 (1983). *Appendix H* is a copy of the *Alex* decision (H7).

In *Alex,* the MSPB affirmed Presiding Official Kelleher's decision in *Block, supra* except as to appellant Burns. The MSPB reinstated Appellant Burns' holding that the FAA had not given him adequate notice of annual leave cancellation (H3, H5).

The *Alex* decision did *not analyze* Presiding Official Kelleher's holdings other than those pertaining to *Burns.* Instead, the MSPB affirmance of *Block* was based upon conclusory observations such as ". . . the presiding official's findings as to those legal issues are essentially consistent with ours; . . ." (H3).

B. Solerwitz's Representation of DesVignes Before the FCCA.

In January, 1985, DesVignes engaged Solerwitz to prosecute an appeal from the MSPB's *Alex* judgment to the FCCA pursuant to 5 USC §7703(a)(1).

Solerwitz filed a 45-page brief and 79-page appendix dated March 21, 1985 with the FCCA (*Appendix I* to the petition are excerpts from the March 21, 1985 brief and appendix Solerwitz filed).

The government's 17-page brief to the FCCA in response to the Solerwitz's was dated May 20, 1985 and contained a 42-page appendix (*Appendix J* to this petition contains excerpts from the government's brief dated May 20, 1985).

Solerwitz filed a 9-page reply brief with the FCCA dated June 7, 1985 (*Appendix K* to this petition contains excerpts from DesVignes's reply brief filed with the FCCA).

On appeal to the FCCA, DesVignes contended that the MSPB's and FCCA's adoption of the "lead case method" was improper given the different circumstances surrounding each ATC's alleged participation in the PATCO strike. DesVignes offered a 1944 case from this Court and a 1957 Fifth Circuit case as support for the principle that the lead case procedure is not properly applied to cases where the facts differ (K2, K3).

Before the FCCA DesVignes urged that his due process rights were violated by the FAA's precipitous firing "before any hearing" relying upon *Cleveland Board of Education v. Loudermill* ____ *V.S.* ____, 53 USLW 4306 (3/19/85) Nos. 83-1362, 1363, G392) (I5). DesVignes requested that the FCCA give *full consideration* to his contention regarding deprivation of his pretermination right to a hearing. DesVignes urged that application of the lead case method to his constitutional due process contentions would *not* allow adequate judicial consideration of that contention. DesVignes further contended that case consolidation was improper, given the factual diversity between ATC cases, and offered two federal circuit cases in support of that contention (I5, I6).

Solerwitz made other contentions on DesVignes' behalf to the FCCA. However, the FCCA's treatment of the above-described contentions regarding the lead case procedure and case consolidation demonstrates the ill effects of not having standards to determine whether an appeal is frivolous under FRAP 38.

C. The FCCA's Decision in DesVignes.

On May 2, 1986, the FCCA decided *DesVignes v. FAA*, ____ F.2d ____ (Appeal No. 85-1111) (A2-A11).

Although the FCCA decision refers to DesVignes by name* (A3, A4), there is *nothing* in the FCCA's decision to indicate that the facts it relied upon were taken from *its own examination of the record.*** The FCCA apparently relied upon the presiding official's characterization of the evidence adduced at the hearing, and did not test those findings against the record.***

The FCCA made inconsistent findings on the *crucial fact* regarding the date when DesVignes was scheduled to report to work following the August 3, 1981 commencement of the PATCO strike. The FCCA's error resulted from its wholesale adoption of the presiding official's findings of fact.

Thus, the FCCA said (A4):

> The presiding official found that DesVignes *was scheduled to work on August 5,* 6, 7, and 8, 1981, that his deadline shift began at 4:00 p.m. on August 5, 1981, . . .

---

*DesVignes was *not* mentioned in MSPB Presiding Official Kelleher's *Block* decision (G1-G33) or in the MSPB's *Alex* decision (H1-H9) *except* in the list of ATCs whose cases were included in the consolidation.

**CSRA §7703(c), 5 USC §7703(c) requires the FCCA "*shall* review the record". *Supra* p. 4.

***Compare the presiding official's characterization of the evidence adduced at hearing (G5, G6) with that in the FCCA decision at (A4).

. . .

> The evidence indicated that DesVignes had failed to report for work *when scheduled,* beginning on August 3, 1981 and thereafter, . . .
>
> [*emphasis added*]

The *first date* DesVignes was scheduled to report to work following the commencement of the August 3, 1981 PATCO strike could *not* have been *both* August 3 and 5, 1981. Review of the presiding official's decision does *not* support the FCCA's characterization of the presiding official's finding concerning the date DesVignes was scheduled to start work. Actually, the presiding official's decision made *no specific reference* to DesVignes when discussing the deadline dates for the ATCs to return to work. (G5-G14).

The FCCA's finding of inconsistent facts on an important issue, and describing portions of the presiding official's decision which did *not* exist are disturbing, considering that DesVignes' livelihood and the holding that Solerwitz filed a "frivolous" appeal rested upon these erroneous findings.

The FCCA's approach to DesVignes' contentions regarding the propriety and constitutionality of the lead case methodology and case consolidation was to mischaracterize them and not deal with them. In rejecting DesVignes' contentions regarding the impropriety and unconstitutionality of case consolidation and the lead case method, the FCCA decision adopts verbatim much of the language from the government's brief. Compare (A5, A6) with (J2-J5).

Review of Solerwitz's brief (I1-I7) and reply brief (K2-K5) to the FCCA reveals numerous case citations were offered to support the impropriety and unconstitutionality of case consolidation and application of the lead case method. Notwithstanding the references to case authority in Solerwitz's brief and reply brief supporting the position that case consolidation and application of the lead case method were improper and unconstitutional, the FCCA decision says [A5]:

> DesVignes' counsel . . . cites *no legal precedent to support* that attack upon this court's exercise of its discretion to manage its docket.
> [emphasis added]

The FCCA's statement that its authority to suspend proceedings is based upon ". . . the doctrine of primary jurisdiction" *ignored the contention in Solerwitz's brief* that case consolidation and application of the lead case method to *DesVignes* case was improper and unconstitutional. Solerwitz's brief did *not* challenge the FCCA's *jurisdiction* to manage its docket. Solerwitz's brief contended to exercise of the MSPB's and FCCA's jurisdiction to consolidate and/or to suspend appeals was *improper in this case.*

Thus, the FCCA did *not deal* with the issues raised in Solerwitz's brief (the propriety and constitutionality of consolidation and application of the lead case method). The FCCA decision dealt with issues that were *not* raised (i.e., its jurisdiction to consolidate or suspend appeals).

The FCCA's decision to terminate DesVignes' employment and to fine Solerwitz were *not* based upon consideration of the *actual contentions* in Solerwitz's brief.

The record before the FCCA indicated that DesVignes' formal requests to obtain facts concerning his discharge were denied. *Supra* pp. 7-8. Having been engaged in January, 1985 to prosecute DesVignes' appeal before the FCCA, Solerwitz *only had* evidence for the record which was developed before the MSPB. Solerwitz's contention that the record was inadequate was ignored in the FCCA decision. Instead, the FCCA said [A6]:

> DesVignes makes no reference at all to the facts relevant to this case, nowhere indicates* that he objected below . . .

The FCCA mischaracterized DesVignes' efforts to obtain the facts surrounding his case, and then proceeded to sustain DesVignes' discharge and to fine Solerwitz based upon those mischaracterizations. This approach rewarded the government's refusal to disclose essential facts concerning the DesVignes' appeal.

The FCCA decision summarily dismissed Solerwitz's contentions concerning DesVignes (A5-A11) but *did not independently examine* the record to determine (a) whether it was adequate or (b) whether the MSPB findings or conclusions were erroneous as required by CSRA §7703(c), 5 USC §7703(c). *Supra* p. 4. The FCCA's statement that it made an independent examination of the record (A10) is *not* consistent with its decision which suggests it borrowed language and reasoning from the government's brief without checking the government's contentions against the record. *Supra* pp. 13. 14.

The FCCA's reasons for fining Solerwitz were novel. Compare the reasons given at pp. A-9 to A-11 with *infra*

*This ignores that DesVignes' requests for information (F7) were denied by the MSPB (F9).

III under "REASONS FOR GRANTING WRIT." The uniqueness of the reasons given for the fines indicates that Solerwitz was exposed to fines for conduct which he was without notice of. In the presence of standards for determining when an appeal is frivolous under FRAP 38 Solerwitz would not have been fined.

REASONS FOR GRANTING WRIT.

I.

The lack of standards for determining whether an appeal is frivolous in FRAP Rule 38 renders the statute unconstitutional for vagueness or overbreadth.

FRAP Rule 38 is a punitive statute authorizing a court of appeals to award monetary fines and costs upon determining an appeal is "frivolous". The fines can be levied against the appellant and his counsel (as in *Cecil v. F.A.A.* 767 F.2d 892, 894), or just the appellate counsel (as the FCCA awarded against Solerwitz here, *Appendix A* (A9 to A11).

Without standards to determine what make an appeal "frivolous" expressed either in the statute, or court rule or in an authoritative opinion from this Court, appellate counsel can only guess as to whether the filing or maintenance of an appeal in the federal courts of appeal will subject them and their clients to penalties.

Since the federal courts of appeal make the initial determination concerning whether to fine an appellant and/or appellate counsel for prosecuting a frivolous appeal under FRAP Rule 38, this Court is the only forum where appellate review of the decision imposing the fine

can be obtained. In the exercise of its supervisory power under its Rule 17.1 over the federal judicial system this Court should consider standards for the types of presentations or conduct which constitute a frivolous appeal. With standards for frivolous appeals established by this Court neither appellants nor their counsel will be discouraged from proper participation in the appellate process.

Clarification of the criteria under which penalties can be assessed for counsel's conduct in federal litigation is an important issue to the public, the bench and the bar. In June 1986 the Federal Bar Council in New York City had to change auditoriums to accommodate those interested in a forum on this subject.

When considering the vagueness or overbreadth of FRAP Rule 38, this Court will have an opportunity to compare and clarify criteria for assessing costs and attorneys' fees under other federal statutes imposing penalites for improper conduct during federal litigation. See e.g., 28 U.S.C. §1927 (which gives federal Courts the power to award attorneys' fees incurred as a result of unreasonable and vexatious delay or multiplication of proceedings before it); 28 U.S.C §1912 (which gives this Court or the courts of appeals discretion to adjudge the prevailing party on an appeal "damages for . . . delay, and single or double costs"); this Court's Rules 50.1 - 50.7 concerning the assessment of "Costs"; and, Federal Rules of Civil Procedure 11 (which provides for sanctions if pleadings, motions, or other papers are *not* ". . . well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that [they are] not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.").

The "frivolous" standard in FRAP Rule 38 is distinguishable from the standard in ". . . 5 U.S.C. §7501(a), authorizing removal or suspension [of nonprobationary federal employees] without pay 'for such cause as will promote the efficiency of the service'." which was held to be neither vague nor overbroad in *Arnett v. Kennedy* 416 U.S. 134, 158-164 (1973).*

While the "frivolous" standard in FRAP Rule 38 is similar to the "cause" standard (in 5 U.S.C. §7501[a]) in that both were intended to be generally applicable to a myriad of different situations, the "frivolous" standard was *not* applied in cases prior to its enactment (as was the "cause" standard considered in *Arnett* 416 U.S. 134, at 160). Furthermore, no administrative agency's Office of General Counsel is available to attorneys or appellants seeking advice on the interpretation of FRAP Rule 38 performing a function similar to that of the General Counsel to the Office of Economic Opportunity which was also referred to in *Arnett* 416 U.S. 134 at 160.

The "frivolous" standard in FRAP Rule 38 is vague considering that persons "of common intelligence must necessarily guess at its meaning and differ as to its application". *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

This case pointedly demonstrates the inability to reasonably anticipate what type of representation will be considered frivolous or what standards will be applied to make that determination. *None* of the eight findings the

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**Arnett's* reasoning concerning vagueness and overbreadth remains viable. See e.g., *Cornelius v. Nutt* ____ U.S. ____, 53 U.S.L.W. 4837 at 4843 [citing *Arnett* in dissenting opinion] (1/7/85).

FCCA made when it fined Solerwititz in this case (*Supra* p. 13) were considered in previous FRAP Rule 38 cases as indicia of frivolous appellate representation.

Previous cases interpreting FRAP Rule 38 suggest that sanctions for "frivolous" appeals are only to be imposed in extreme circumstances. In *Ruderer v. Fines,* 614 F.2d 1128, 1132 (7th Cir. 1980) sanctions were imposed against a plaintiff who appeared *pro se* and initiated multiple proceedings in state and federal courts over a fifteen year period against various government officials following his discharge from federal employment. The "self-styled" claims advanced on the appeal were rejected in several previous decisions. The Seventh Circuit held the appellant's complaints "frivolous, malicious, filed in bad faith and totally devoid of any semblance of colorable merit," and "filed with no serious intention of obtaining relief and solely for the purpose of harassment."

The Seventh Circuit in *Ruderer* said that sanctions should be imposed under FRAP Rule 38 only after a court makes *two* determinations, to wit [614 F.2d at 1132]:

> First, it must determine that the appeal is frivolous. "A frivolous appeal means something more to us than an unsuccessful appeal." *NLRB v. Lucy Ellen Cady Division* 517 F.2d 551, 555 (7th Cir. 1975). Second, the appellate court, in its discretion, must examine whether the appeal is an appropriate one for the imposition of a sanction.

In *Fluoro Electric Corporation v. Branford Associates,* 489 F.2d 320, 326 (2d Cir. 1973) the Second Circuit imposed sanctions under FRAP Rule 38 where the appellant ". . . prosecuted three appeals to this court. . . . In none of

these appeals was there a pretense to any ground for appeal other than the claim that the judgment was against the wrong entity." The "critical question" according to the Second Circuit in FRAP Rule 38 cases ". . . is . . . whether the situation . . . is one of the '*highly unusual' circumstances* which permit the imposition of sanctions . . . because of a clear showing of bad faith." [*emphasis added*]

Analysis of FRAP Rule 38 cases indicates that they fall into categories according to the wrongdoing sought to be punished. (*Appendix L* to this Petition lists sanction cases according to Circuit.)

In the ATC cases the FCCA's application of FRAP Rule 38 to impose sanctions as a consistent practice when the Court finds no merit in an appellant's arguments indicates a departure from previous standards for determining whether an appeal is "frivolous." This departure results in unanticipated punishment of appellants and attorneys for their participation in the appellate process.

This Court's articulation of standards for determining whether an appeal is frivolous will reduce the uncertainty created by the FCCA's decision below.

II.

Consolidation and use of the "lead" case procedure by the MSPB and FCCA infringed the petitioner's due process rights.

As an "employee" under 5 U.S.C. §7511 (a)(1)(A) subject to "removal" under 5 U.S.C. §7512 (2) each petitioner was entitled to the due process rights specified in 6

U.S.C. §7513 and §7703. Thus, *each petitioner* had the right to representation by an attorney; to copies of "any supporting material" the agency relied upon in deciding to discharge the petitioner; to appeal the FAA decision to the MSPB; and, to appeal the MSPB decision to the FCCA.

Although Petitioner's letter dated August 17, 1981 indicated he could not respond to the FAA's charges without *all* information he requested in his August 15, 1981 letter (F13), this information was *not supplied* in full. *Supra* pp. 7-8. Consolidation and adoption of the lead case procedure by the MSPB and FCCA resulted in denial of the individual requests for supporting material in the FAA file essential to each petitioner's defense. *id.*

Without information essential to the defense at the hearing level counsel could not make an adequate record on appeal.

Further denial of petitioner's statutory due process right to appeal resulted from implementation of the "lead" case and summary affirmance procedures. By utilizing these procedures the FCCA avoided examining so much of the record as reflected facts unique to the circumstances surrounding petitioner's removal by the FAA. *Supra* pp. 11-12.

Although the petitioner urged harmful procedural errors occurred in violation of his statutory due process rights as grounds for the FCCA to reverse his discharge, (see e.g. I-4 to I-7) the FCCA did *not decide this issue.*

The suspension of petitioner's appeal for 23 months while the 11 "Lead" cases were decided, and delays before hearing caused by the FAA were independent violations of the due process requirement that hearings be held "at a

meaningful time." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) as quoted in *Barry v. Barchi,* 443 U.S. 55 at 66 (1979). Lengthy delays of hearings in employment termination cases are especially disruptive for both the employer and employee.

The FCCA's discouraging the taking and rigorous pursuit of appeals by pre-appeal warnings and post-appeal fines infringed the right to appeal and to be represented by counsel upon the appeal.

In sum, at every critical stage of the proceedings following the PATCO strike petitioner's substantive and procedural statutory due process rights were infringed. Judicial consideration of these important rights should not be ignored as they were by the court below.

III.

Sanctions for improprieties by attorneys under FRAP Rule 38 should only be awarded in extreme or unusual circumstances upon a clear showing of bad faith, delay, relitigation of an issue, or interposition for an improper purpose such as to harass or needlessly increase the cost of litigation.

This Court faces docket control problems no less serious than the FCAA. Stern, Gressman, and Shapiro in *Supreme Court Practice (6th ed.)* make this observation at page 639:

> *Although the Court has not yet done so,* it possesses the power to award attorneys' fees incurred as a result of unreasonable and vexatious delay or multiplication of proceedings before it. 28 USC §1927.

In 1982, before the FCCA started imposing fines because it disagreed with appellants' contentions, its use of the FRAP Rule 38 sanction power was consistent with the restraint exercised by this Court and other federal circuits. Compare *Asberry v. U.S. Postal Service*, 692 F.2d 1378, 1382 (Fed. Cir. 1982) with cases at *Supra* pp. 220-21 and in *Appendix L.*

The FCCA has now come full circle and assesses sanctions on a regular basis in ATC appeals even where the issues raised were concededly *not* decided in any of the "Lead" cases. See e.g., *Dawson v. FAA*, 769 F.2d 754 (Fed. Cir. 1985).

Sanctions function to punish and deter conduct considered undesirable. Freedom to present appellate argument in a professionally reasonable manner is essential to the appellate process. Liberal use of the FRAP Rule 38 sanction power infringes the freedom to present appellate argument, and discourages use of the appellate process.

Without standards to determine when an appeal is "frivolous" litigants will be subject to the whim of the federal circuit court. They will be subject to a Court's *ad hoc* interpretation of "frivolous" applied without adequate consideration of the appellate record for the improper purpose of discouraging appeals.

A standard which directs that the sanction power be used sparingly upon a clear showing of one or more of the circumstances delineated under III would help to alleviate the uncertainty which accompanies the undefined word "frivolous" in FRAP Rule 38.

In determining whether an appeal is "frivolous" a Court should also consider (1) the difficulty presented by the facts and the law, and practical problems in management of the litigation, and (2) constraints upon appellate counsel imposed by adverse decisions below (i.e. inability to obtain essential facts because of adverse discovery rulings).

IV.

Petitioner's appeal was not frivolous.

The FCCA avoided examination of petitioner's appellate record by mischaracterizing DesVignes' contentions on appeal and not deciding the essential issues which were actually raised.

The FCCA also did not address issues raised in the Petitioner's brief which explained why additional facts regarding the appeal were not included (i.e. harmful procedural error prevented appellant's counsel from learning more facts).

Solerwitz representation of the petitioner was hindered by adverse agency and court determinations over which he had no control. It was, nevertheless, adequate, not interposed for an improper purpose, in bad faith, to foster delay or to increase the cost of litigation.

Conclusion.

To clarify and guide the bench and the bar in the delicate area of imposing sanctions for improper conduct in the prosecution of a federal appeal, this petition for certiorari should be granted.

Respectfully submitted,

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Of Counsel
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August 2, 1986

Appendix A—*DesVignes v. F.A.A.* ____ F.2d ____ (Fed. Cir. 5/2/86) Decision/Order Fining Solerwitz $1,000.00.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

717 Madison Place, N.W.
Washington, D.C. 20439

Francis X. Gindhart
Clerk

Telephone: 633-6550
Area Code 202

May 2, 1986

NOTICE TO COUNSEL

The Court today announced its decision in the attached appeal or appeals.

A copy of the Court's opinion or opinions is enclosed, and judgment thereon has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Costs may be recovered (by *Petitioner or Respondent*) as provided by Rule 39, Federal Rules of Appellate Procedure.

Very truly yours,

FRANCIS X. GINDHART, Clerk

By Spencer C. Greene
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HAROLD J. DES VIGNES,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1111

Andrew Mead von Salis, of Solerwitz & Leeds, Mineola, New York, submitted for petitioner.

Sandra P. Spooner, Assistant Director, Commercial Litigation Branch, Department of Justice, Washington, D.C., submitted for respondent. With her on the brief were *Richard K. Willard,* Acting Assistant Attorney General and *David M. Cohen,* Director. Of counsel was *Diane R. Liff,* Office of the General Counsel, Department of Transportation, Washington, D.C.

Appealed from: Merit Systems Protection Board

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HAROLD J. DES VIGNES,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1111

DECIDED: May 2, 1986

Before MARKEY, *Chief Judge,* RICH and SMITH, *Circuit Judges.*

PER CURIAM.

Harold J. Des Vignes appeals from a decision of the Merit Systems Protection Board (board), affirming his removal from his position as an air traffic controller because of his participation in an illegal strike and absence from his position without authorization. We *affirm* and impose a *sanction* on counsel.

BACKGROUND

Des Vignes was removed from employment as an air traffic controller at the Houston Air Route Traffic Control Center in Houston, Texas. He appealed to the Dallas Regional Office of the MSPB, which held a hearing.[1]

On January 3, 1983, the presiding official issued an initial 32-page decision affirming the FAA's action.[2] The presiding official found that the strike continued through at least August 6, 1981, that Des Vignes was scheduled to work on August 5, 6, 7 and 8, 1981, that his deadline shift began at 4:00 p.m. on August 5, 1981, and that he did not report for any of his scheduled shifts. The agency presented watch schedules reflecting when Des Vignes was scheduled to work, personnel sign-in logs, and his time and attendance record. That evidence indicated that Des Vignes had failed to report for work when scheduled, beginning on August 3, 1981 and thereafter, and that he was absent without leave during the period August 3 through August 8. The agency also presented the testimony of Des Vignes' facility chief, Mr. Arnold E. Price.

The presiding official properly concluded, citing authority, that the agency had presented prima facie proof that Des Vignes had participated in a strike against the

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[1]Des Vignes' appeal was included in the consolidation captioned at the hearing level *Richard W. Block v. Department of Transportation, FAA,* Docket No. DA075281F0892 (Initial Decision Jan. 3, 1983), and captioned before the full board *Stephen P. Alex v. Department of Transportation, FAA,* Docket No. DA075281F1329, reported at 17 M.S.P.R. 479 (MSPB 1983).

[2]Des Vignes' counsel filed a copy of the full board's decision on review, which summarily affirmed the presiding official's decision with respect to Des Vignes. Des Vignes' counsel did not file a copy of the presiding official's decision.

United States. Des Vignes did not testify, but elected to rest after presentation of FAA's evidence. Des Vignes' counsel raised various legal arguments, all of which the presiding official properly rejected. Accordingly, the presiding official concluded and the board agreed that the agency had proven by a preponderance of the evidence, that Des Vignes had participated in the strike and was absent without leave.

Des Vignes' counsel devotes ten pages of his brief to a contention that this court's suspension of proceedings pending the board's resolution of certain cases denied Des Vignes due process, yet cites no legal precedent to support that attack upon this court's exercise of its discretion to manage its docket. The suspension is supported by the doctrine of primary jurisdiction. *See, e.g., Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 306 (1973); *United States v. Western Pacific Railroad Co.,* 352 U.S. 59, 62-70 (1956); *Far East Conference v. United States,* 342 U.S. 570, 574-75 (1952). It was based as well on precedents of this court and on common sense. *See, e.g., Oceanic Steamship Co. v. United States,* 586 F.2d 774, 793-94 (Ct. Cl. 1978); *Seaborad Airline Railroad Co. v. United States,* 387 F.2d 651, 656 (Ct. Cl. 1967); *McLean Trucking Co. v. United States,* 387 F.2d 657, 660-61 (Ct. Cl. 1967).

In Des Vignes' reply brief, counsel asserts that every petitioner has a right to present the facts of his case to the board and to this court. No petitioner has been denied that right. Access to the courts is a fundamental right, yet nothing in the cases cited by Des Vignes' counsel even remotely suggests that Des Vignes has been denied access, or that courts may not manage their dockets to prevent duplicative and unjustified litigation. Similarly, the assertion that 28 U.S.C. §2072 has been violated rests solely on an unsupported, unsupportable, conjectural, and con-

clusory assertion that this court's suspension of proceedings denied Des Vignes a proper hearing.

Finally, counsel's bald assertion, unsupported by any reference to the record or to evidence of distinguishing facts, that the precedents of this court are immaterial and distinguishable from this case, is not only without merit, but professionally reprehensible. Counsel has not shown any facts that distinguish the present appeal from the fact patterns in this court's earlier decisions. It is not true that a petitioner has a right to require the court to repeatedly decide the same issues on the same facts.

Des Vignes' attack on the propriety of the board's consolidation of his appeal with those of others is baseless and in disregard of the rule that management of the board's docket is matter within the board's discretion. *REA Express, Inc. v. United States,* 568 F.2d 940, 950 (2nd Cir. 1977), *cert. denied,* 435 U.S. 923 (1978). Des Vignes makes no reference at all to facts relevant to this case, nowhere indicates that he objected below, and does not even allege that the factors governing consolidation militate against it here. *See, e.g., Dorrance v. Department of Transportation, FAA,* 735 F.2d 516, 519 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984); *Moylan v. Department of Transportation, FAA,* 735 F.2d 524, 525 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984); *In re Air Crash Disaster at Florida Everglades,* 549 F.2d 1006, 1013-14 (5th Cir. 1977).

Des Vignes' unsupported contention that the agency was motivated by revenge is unworthy of comment. *See Schapansky v. Department of Transportation, FAA,* 735 F.2d 477, 483-84 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1985). His attack on the drawing of an adverse inference from refusal of air traffic controllers to testify was rejected in *Adams v. Department of Transportation, FAA,*

735 F.2d 488, 492 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984). His argument that federal employees have a constitutional right to strike disregards the statute, 5 U.S.C. § 7311(3); 18 U.S.C. § 1918, and contrary precedent. *See United States v. Taylor,* 693 F.2d 919 (9th Cir. 1982); *United States v. Haggerty,* 528 F. Supp. 1286 (D. Colo. 1981); *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879 (D.D.C.), *aff'd mem.,* 404 U.S. 802 (1971). His bare allegation that his union activity short of striking was the basis for charges against him was rejected in *Schapansky,* 735 F.2d at 482-83. His contention that the notice period was improperly reduced under the "crime exception" of 5 U.S.C. § 7513 was rejected in *Schapansky,* 735 F.2d at 486, and in *Novotny v. Department of Transportation, FAA,* 735 F.2d 521, 523 (Fed. Cir. 1984). His assertion that notice to reply "within seven (7) days" violated 5 U.S.C. § 7513(b)(2) was rejected in *Adams,* 735 F.2d at 490 n.3. His contention that the agency should have sent him personal copies of materials relied upon by the agency was rejected in *Novotny,* 735 F.2d at 523. His contention that notice was insufficient was rejected in *Adams,* 735 F.2d at 491, and in *Anderson v. Department of Transportation, FAA,* 735 F.2d 537, 539-40 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984). His assertion that he was removed for failing to return to work within the 48 hour grace period was rejected in *Anderson,* 735 F.2d at 540. His contention that the harmful error rule should not be applied to procedures required by statute was rejected in *Adams,* 735 F.2d at 490 n.3., and that rejection was reaffirmed in *Handy v. Postal Service,* 754 F.2d 335, 337 (Fed. Cir. 1985). His argument that nexus is lacking between his conduct and the efficiency of the service was rejected in *Schapansky,* 735 F.2d at 484, as was his contention that removal is too harsh for strike participation, *id.* at 484-86. His contention that prima facie proof of strike

participation must include more than proof of unauthorized absence during a strike of general knowledge was rejected in *Schapansky, id* at 482-84. His assertion that hearsay evidence can never constitute prima facie proof was rejected in *Campbell v. Department of Transportation, FAA,* 735 F.2d 497, 502 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984). His argument that the agency must do more than prima facie prove intent to strike was rejected in *Schapansky,* 735 F.2d at 483. His contention that he thought he had been fired, was confused by conflicting orders, and that FAA did not notify him when to return, was correctly characterized as "disingenuous" in *Adams,* 735 F.2d at 490-91. Nothing of record indicates that Des Vignes was confused, or that he attempted to contact the facility to seek clarification of his deadline. *See Anderson,* 735 F.2d at 540. His unsupported assertion that he was excluded by Houston Center security guards directly challenges the findings and credibility determinations of the presiding official, which this court will not second-guess, *DeSarno v. Department of Commerce,* 761 F.2d 657 (Fed. Cir. 1985), and is "no more than . . . a perfunctory challenge to the record." *Kochanny v. Bureau of Alcohol, Tobacco, and Firearms,* 694 F.2d 698, 703 (Fed. Cir. 1982).

This appeal is clearly frivolous. *Cecil v. Department of Transportation, FAA, 767 F.2d 892 (Fed. Cir. 1985); Moir v. Department of the Treasury,* 754 F.2d 341 (Fed. Cir. 1985); *Asberry v. United States,* 692 F.2d 1378 (Fed. Cir. 1982). The constitutional arguments presented in Part I of Des Vignes' brief are patently frivolous. The arguments set forth in Part II merely restate contentions already rejected in precedent cases and make no attempt to distinguish those cases on either fact or law. Part III, purporting to address individual facts of Des Vignes' case, contains only summary and conclusory statements unsup-

ported in any manner by the record or even by references to the record. Indeed, counsel totally disregards Fed. R. App. P. 28(a)(3), and this Court's Rule 13(a), requiring citations to the record.

Abuse of the Judicial Process

Counsel for Des Vignes, Mr. Jack B. Solerwitz, filed an appearance and a brief in this and in each of the 130 other individual air controller appeals now before this panel. The appeals involve hundreds of individual former air controllers. Except for a paragraph or two relating to individual air controllers, 107 of those briefs are virtually identical to that filed in this case.[3] That they are copies is indicated by the presence of the same typographical errors in each, and by the failure to distinguish between appeals, involving one petitioner from those involving multiple petitioners. Each contains the same type of patently frivolous constitutional arguments, rejected contentions, and unsupported assertions of fact discussed above. Each disserves the court in violating the rule requiring citations to the record.[4] The court was required to check the record and was required to read, and has read, all 131 sets of briefs, in an effort to insure against the possibility that a meritorious appeal might otherwise be overlooked. The court will issue an individual opinion in each of the 131 appeals.

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[3]The briefs in 23 appeals are not identical to that in this case. They are in two groups: (1) 16 in which the bodies of the briefs are identical; (2) 7 in which the briefs are entirely identical. All 131 briefs reflect violation of court's rule requiring citation to the record, as discussed herein.

[4]In 51 cases, counsel filed no appendix, in disregard of Fed. R. App. P. 30(a), and this court's Rule 12. In 38 of those cases, counsel requested and was denied leave to file a late appendix.

Counsel was repeatedly warned against the filing of frivolous appeals presenting legal issues and fact patterns indistinguishable from those presented and decided in earlier air controller appeals rising out of the same strike and the Presidential action in response thereto. *See Bowen v. Department of Transportation, FAA,* 769 F.2d 753, 756 & n.4 (Fed. Cir. 1985).[3]

Counsel's attention was called by this court to those earlier cases, though counsel is accountable for knowledge of this court's decisions without such notice. With that notice, counsel was requested to review the propriety of continuing to maintain the appeals he had filed. Counsel was sent copies of earlier air controller decisions in wich the court found the appeal frivolous and imposed a sanction. With those decision copies, counsel was again requested to review the continued maintenance of any appeal indistinguishable from earlier decisions of this court. Counsel simply ignored those warnings and requests of the court.

Respondent prepared briefs in response to each of counsel's 131 virtually identical briefs. Counsel's failure to refer to the record forced Respondent to do the work incumbent upon counsel. Counsel's failure to supply an appendix in some cases forced Respondent to do so in those cases. Respondent cited the frivolous, rejected, and unsupported contentions discussed above. Respondent also cited counsel's frequent, repeated, and brazen violations of this court's rules. Mr. Solerwitz' reply briefs simply ignored those citations, merely *stating* that the earlier cases were distinguishable (but citing no distinguishing facts), ignored Respondent's charge that he had failed to cite to

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[3]Requests that counsel review the propriety of maintaining appeals in light of the need to avoid frivolity and the accompanying abuse of the judicial process were sent to counsel on July 12, 1985, July 31, 1985, and August 30, 1985.

the record, and stated that the appeal was filed to give Des Vignes access to the court. Faced with clear and insurmountable indication that all 131 appeals were frivolous, Mr. Solerwitz has continued to maintain this and the other 130 appeals.

Counsel's conduct in filing and maintaining this appeal has wasted the time and limited resources of this court, has caused unnecessary expenditure of Respondent's (and thus the taxpayers') resources without even a colorable basis in fact or law, and has denied the availability of this court's resources to deserving litigants.

Counsel's conduct in this and in the other 130 appeals now before us constitutes a flagrant and totally inexcusable abuse of the judicial process.

Accordingly, in respect of this appeal, No. 85-1111, Mr. Solerwitz shall personally pay to the government as a penalty the sum of $1,000. Fed. R. App. P. 38. That payment shall be made within 30 days following the date of this opinion, and Mr. Solerwitz shall notify the Clerk of this court when the payment is made.

AFFIRMED—SANCTION IMPOSED

Appendix B—*DesVignes v. F.A.A.* ____ F.2d ____ (Fed. Cir. 5/2/86) Judgment Fining Solerwitz $1,000.00.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HAROLD J. DES VIGNES,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1111

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

IN CASE NO(S). Docket No. DA075281F1329

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: Affirmed; Mr. Solerwitz shall personally pay to the government as a penalty the sum of $1,000. Fed. R. App. P. 38. That payment shall be

made within 30 days following the date of this opinion, and Mr. Solerwitz shall notify the Clerk of this court when the payment is made.

ENTERED BY ORDER OF THE COURT

FRANCIS X. GINDHART, CLERK

DATED May 2, 1986

ISSUED AS A MANDATE: June 6, 1986

Appendix C—*DesVignes v. F.A.A.* ____ F.2d ____ (Fed. Cir. 5/27/86) Decision/Order Denying Stay Pending Certiorari Consideration.

Note: This order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HAROLD J. DES VIGNES,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1111

Before MARKEY, *Chief Judge,* RICH and SMITH, *Circuit Judges.**

*The motion is mistakenly addressed to Circuit Judge Friedman, Circuit Judge Nies, and Senior Judge Miller.

C2

ORDER

Jack B. Solerwitz has filed a 19-page "Application to Stay Mandate Pending Certiorari Consideration", with a 31-page set of attachments. This court's opinion in this case, issued May 2, 1986, set forth the clearly frivolous nature of the appeal, Mr. Solerwitz' disregard of this court's rules, and his abuse of the judicial process, for which the court imposed a sanction on Mr. Solerwitz personally of $1,000.

The application contains extended attacks on the work of the Federal Aviation Administration, the Merit Systems Protection Board, and this court in the litigation resulting from the air controllers' strike of 1981. It makes no effort to show that the appeal in this case was not frivolous. On the contrary, it asserts reasons why counsel did not and could not file a non-frivolous appeal, citing circumstances that allegedly "left petitioners' appellate counsel with insufficient access to facts and insufficient time or opportunity to give each petitioner's case adequate attention" and "made 'nonfrivolous' representation difficult if not impossible."

The application rests on the facetious assumption that there is a "constitutional right" to file frivolous appeals. It then attempts to convert this court's efforts to caution counsel against requiring the court to repeatedly decide cases indistinguishable from those already decided into a denial of that "right." Because the application itself borders on the frivolous, the court did not require the government to respond to it.

Mr. Solerwitz misstates the facts. This court did not base its frivolity determination on the basis of cases "not even decided when the present appeals were filed." In accord with this court's Notice of December 10, 1984 (*after* the Supreme Court had denied certiorari in the lead cases), new petitions

and new filing fees were filed. Moreover, the sanction imposed on Mr. Solerwitz was for filing and *maintaining* the appeal, as well as for disregarding the court's rules and abusing the judicial process.

The application makes no effort to challenge the correctness of the court's decision on the merits in this case, but seeks to stay the mandate only to delay the terminal date (June 2, 1986) of the period within which Mr. Solerwitz has been ordered by this court to pay $1,000 to the government. Mr. Solerwitz neither contends nor shows that his payment of that amount would subject him to irreparable injury. Nor has Mr. Solerwitz shown any basis for believing that the Supreme Court would grant a petition for certiorari to review the present imposition of a sanction. In sum, Mr. Solerwitz has made no showing sufficient to justify a stay of our mandate in this case.

Accordingly, it is ORDERED:

(1) The Application for stay is denied.

(2) The order of this court that Mr. Solerwitz pay $1,000 to the government on or before June 2, 1986 is reaffirmed.

Date 27 May 86

FOR THE COURT

HOWARD T. MARKEY
Chief Judge

Filed
U.S. Court of Appeals For
The Federal Circuit
May 28, 1986
FRANCIS X. GINDHART
Clerk

Appendix D—*DesVignes v. F.A.A.* ____ F.2d ____ (Fed. Cir. 6/3/86) Order Denying DesVignes' Application for Leave to File Reply to the Respondent's Opposition to Petitioner's Application for a Stay of Mandate.

UNITED STATES
FEDERAL CIRCUIT COURT OF APPEALS

HAROLD J. DES VIGNES,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1111

ORDER

Upon consideration of Petitioner's Application for Leave to File a Reply to the Respondent's Opposition to Petitioner's Application for a Stay of Mandate and Petitioner's Reply, it is the ____ day of ____, 1986;

ORDERED that Petitioner is given leave to file the Reply to Respondent's Opposition and the Reply shall be accepted for filing with the Clerk of this Court.

D2

FOR THE COURT

Dated: _____, 1986
Washington, D.C.

cc: Sandra P. Spooner, Esq.
Jack B. Solerwitz, Esq.

Denied 3 June 86
H. T. MARKEY
Ch. Judge

Filed
U. S. Court of Appeals for
the Federal Circuit
Jun 6 1986
FRANCIS X GINDHART
Clerk

Appendix E—*DesVignes v. F.A.A.* ____ U.S. ____ (6/2/86) Decision/Order Denying Stay Pending Certiorari Consideration.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.,
Clerk of the Court

Area Code 202
479-3011

June 2, 1986

Jack B. Solerwitz, Esquire
c/o Leonard W. Krouner, Esquire
170 Old Country Road, Suite 310
Mineola, NY 11501

Re: Harold J. Des Vignes v. Department of Transportation, Federal Aviation Administration, A-924

Dear Mr. Solerwitz:

Your application for a stay pending appeal in the above-entitled case has been presented to the Chief Justice, who has endorsed thereon the following:

"Denied
WEB
5/30/86"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By
EDWARD L. TURNER, JR.
Assistant Clerk

vjr

cc: Hon. Charles Fried, Solicitor General

Appendix F—*Des Vignes v. F.A.A.* ____ F.2d ____ Documents From Petitioner's Appendix to Petitioner's F.C.C. Brief dated March 21, 1985.

APPOINTMENT AFFIDAVITS

IMPORTANT.—Before swearing or affirming to these appointment affidavits, you should read and understand the attached information for appointee

ATCS DEC. 10, 1968

FAA LAX ARTCC. PALMDALE, CALIF.

I, HAROLD JOHN DES VIGNES, do solemnly swear (or affirm) that—

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. SO HELP ME GOD.

B. AFFIDAVIT AS TO SUBVERSIVE ACTIVITY AND AFFILIATION

I am not a Communist or Fascist. I do not advocate nor am I knowingly a member of any organization that advocates the overthrow of the constitutional form of the Government of the United States, or which seeks by force or violence to deny other persons their rights under the

Constitution of the United States. I do further swear (or affirm) that I will not so advocate, nor will I knowingly become a member of such organization during the period that I am an employee of the Federal Government or any agency thereof.

C. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof. I do not and will not assert the right to strike against the Government of the United States or any agency thereof while an employee of the Government of the United States or any agency thereof. I do further swear (or affirm) that I am not knowingly a member of an organization of Government employees that asserts the right to strike against the Government of the United States or any agency thereof and I will not, while an employee of the Government of the United States or any agency thereof, knowingly become a member of such an organization.

D. AFFIDAVIT AS TO PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

HAROLD J. DES VIGNES

Subscribed and sworn (or affirmed) before me this 16th day of December A.D. 1968, at Palmdale, California.

[Seal] DONALD C. DELMERS
Acting Chief, Los Angeles Center

F4

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

Air Route Traffic Control Center
P. O. Box 60308
Houston, Texas 77205

REGISTERED MAIL

AUG 8 1981

Mr. Harold J. DesVignes
14127 Merry Meadow Drive
Houston, Texas 77049

Dear Mr. DesVignes:

This is notice that I intend to remove you from your position of Air Traffic Control Specialist, GS-2152-14, $41,657 per annum, ARTC Center, Houston, Texas.

The reasons for the proposed actions are:

Reason 1. Violation of 5 USC 7311 which states in pertinent part, "an individual may not accept or hold a position in the government of the United States . . . if he . . . participates in a strike against the government of the United States . . .," and 18 USC 1918 which makes participation in a strike against the government of the United States a crime for which a sentence of imprisonment can be imposed.

Specification. Beginning at approximately 7:00 a.m. Eastern Daylight Time (EDT) on August 3, 1981, a nationwide strike by air

traffic controllers occurred. Beginning at 4:00 p.m. CDT, on August 5, 1981, when you failed to report for duty, until the present, you participated in a strike against the United States government.

Reason 2. Unauthorized Absence.

Specification. Beginning first at the 4:00 p.m. CDT shift on August 5, 1981, you failed to report for your scheduled tour of duty. On August 3, 1981, you were sent a telegram/mailgram that an illegal strike was in progress and that you must return to duty for your regularly scheduled shift. You failed to return to duty and instead remained absent without authorization.

The material relied upon to support this proposed action is available for review in my office. If you wish to review this material, please contact Dorcille Z. White, (713) 443-8545, ext. 240, Houston ARTC Center, 16600 John F. Kennedy Blvd., Houston, Texas 77205.

The foregoing action constitutes a strike against the Government prohibited by 18 USC 1918 and 5 USC 7311. This gives me reasonable cause to believe that you have committed a crime for which a sentence of imprisonment can be imposed. Therefore, you may reply to this notice personally, in writing, or both, and furnish affidavits and other documentary evidence in support of your answer to me within seven calendar days after you receive this letter. In making a reply, you have the right to be represented by an attorney or other representative. As soon as possible after your reply is received, or after the expiration of the

7-day limit, if you do not reply I will issue a written decision on the proposed removal.

Original Signed by

ARNOLD E. PRICE
Chief, Houston Center

cc: ASW-16
ASW-540

RE: Harold J. DesVignes

Dear Sir:

This is to request an extension of time in which to file a written answer to the notice of proposed action against me for the reasons stated below.

First, there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed. Therefore, the crime exception to the rule set forth in 5 U.S.C. §7513, which requires that I be given a thirty (30) day advance notice of this proposed action, is inapplicable.

I also understand that even if the crime exception to the 30-day rule is invoked, the controlling criterion is that I am entitled to a "reasonable time," (which may not be *less* than seven days) in which to file my answer. 5 U.S.C. §7513(b)(2). I do not feel that, under the circumstances that apply, seven days is a reasonable time for filing a response.

I request that copies of all the materials relied on by the FAA to support its proposed action be sent to me. By separate letter to the Freedom of Information Office of the FAA, I am also requesting disclosure of all notices of proposed actions issued since January 1, 1978, and between January 1, 1969, and January 1, 1971. As I am entitled to review all of the materials relied on by the FAA to support its proposed action, see 5 C.F.R. §752.404, I request that I be given at least 20 days from the receipt of these materials to answer personally the charges.

I also request that I be given an opportunity to make such an oral presentation in my defense to an official of the FAA a reasonable time prior to filing my written response, as is required by 5 U.S.C. §7513(b)(2). Please inform me specifically of the time and place such a personal

presentation may be made and the date on which my written response is due. Given the gravity of the charge, I request that this matter be treated confidentially and singularly and that no less than one hour be reserved for my personal reply.

I hereby designate Frank Juarez as my respresentative in this proposed action. Please send copies of all communications in this action to myself at: 14127 Merry Meadow Drive, Houston, Texas 77049.

Sincerely,

HAROLD J. DES VIGNES

Freedom of Information Office (ATA-10)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Re: Freedom of Information Act Request

To Whom It May Concern:

This is to request that the Federal Aviation Administration make disclosure and provide copies of certain materials available under the Freedom of Information Act, 5 U.S.C. Section 552, and the relevant regulations of the agency.

Specifically, I request disclosure to me of records held in any form that (a) document adverse personnel action proposals and final decisions by the FAA since January 1, 1978, and from January 1, 1969, through January 1, 1971; (b) indicate how FAA determines whether there is "reasonable cause to believe that a crime for which a sentence of imprisonment can be imposed" has been committed, within the meaning of 5 U.S.C. §7511; (c) indicate how FAA interprets the meaning of the words "*participates*" and "*strike,*" as found in 5 U.S.C. §7311(3), and the authority for such interpretations.

The FAA has initiated disciplinary proceedings against me, and access to the materials requested above is necessary for me to prepare an adequate defense. If any portion of this request denied, I request a detailed statement of the reasons for the withholding and an index or similar statement of the nature of the documents withheld.

Pursuant to the Act, I request waiver of all charges, but, if waiver is denied, I promise to pay reasonable charges incurred for an appropriate search and copying of these documents upon presentation of an invoice along with the finished documents.

If search and copying fee will exceed $25.00, please notify my representative Frank Juarez, or myself, at (below). You may notify us whether this request will be granted at the address below. I would appreciate hearing from you as soon as possible so that I may begin to prepare my defense. Thank you for your assistance.

Sincerely,

HAROLD J. DES VIGNES
14127 Merry Meadow Drive
Houston, Texas 77049

F11

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration
Air Route Traffic Control Center
P. O. Box 60308
Houston, Texas 77205

AUG 15 1981

Mr. Harold J. DesVignes
14127 Merry Meadow Drive
Houston, TX 77049

Dear Mr. DesVignes:

Your request for an extension of time in which to reply to the proposed notice of removal is hereby denied.

You may arrange for a time to make the oral reply by contacting me *immediately* by telephone at 713-443-8545, extension 200. You are reminded that you have seven days from the date you received the proposed removal notice in which to reply orally and/or in writing.

A copy of the material relied upon to support the action is enclosed as requested.

The Federal Aviation Administration records which you requested in your undated letter cannot be provided by this office. In order to avoid delay in processing your request for records, we have forwarded your inquiry to the FOIA Coordinator for action. You should hear from that office in the near future. Should you have occasion to make further inquiry with regard to your request, address all correspondence to:

Federal Aviation Administration
FOIA Coordinator
Attention: ASW-60A
P. O. Box 1689
Fort Worth, Texas 76101

The documents you requested under the Freedom of Information Act were not relied upon to support the proposed action, therefore, the seven days notice will not be extended pending a response to your request.

Original signed by

ARNOLD E. PRICE
Chief, Houston Center

Enclosures

cc:
ASW-16
ASW-540

professional air traffic controllers organization

Arnold Price
FAA ARTC Center
Houston, Texas

August 17, 1981

Re: Harold J. Des Vignes

Dear Mr. Price:

This is in response to the proposed removal action against me dated August 8, 1981.

Because I have been informed in a pre-prepared notice that the FAA believes I have committed a crime and because of ambiguities in the notice and the statutes that apply, I cannot deny or affirm the charges at this time.

In order for me to protect my rights and answer fully, I need to know how it was determined that I was participating in a strike (which is a crime). There is, as far as I know, no definition of the term "strike" or "participating" applicable to employees in the federal sector. I must know this information and how strike status differs from AWOL or sick leave status before I am able to answer the charges.

I have requested an opportunity to present an oral answer and did not get one, this was a harmful error under 5 U.S.C. Section 7513.

I have requested from the FAA's Freedom of Information Office copies of all notices of adverse personnel actions since January 1, 1978, and between January 1, 1969 and January 1, 1971, as well as all final FAA decisions in the adverse action cases initiated by those notices, in addition to the other information relating to interpretation of terms used in the notice. Because I have not yet received this information, I do not feel that I have been

allowed to prepare my defense adequately. I believe that any decision in my case should wait until I have been given a reasonable opportunity to review this information.

Sincerely,

HAROLD J. DES VIGNES

TAB 7 RESPONSE TO MATERIAL ISSUES RAISED BY APPELLANT

It is the Federal Aviation Administration's position that appellant was properly afforded all rights under existing regulations. Appellant was informed with sufficient specificity and detail as to the reasons for the proposed removal. To insure delivery of pertinent correspondence, appellant was mailed a copy of the proposal letter and the decision letter by both regular mail and registered mail. Questions 8 and 9 on the appeals form verify that appellant received a copy of the appropriate correspondence. In prepared written responses and/or oral responses to the letters of proposed removal, allegations were made in some cases that the agency did not provide the information needed to prepare an adequate defense to the charge; however, the agency maintains that appellant was indeed provided the opportunity to review and obtain copies of all material relied on to support the action. When raised, the appellant was informed that the additional documents requested were not used to support the action and the request wouldl not serve as a basis for extending the notice period. The agency did not adopt any unique or different definitions of the terms "strike" and/or "participate"; therefore, the common English usage of the terms are applicable in all cases.

Appellant was also specifically notified of the right to reply both orally and/or in writing. Those that failed to reply did so at their own election. The deciding official gave due consideration to the evidence available and the appellant's response, if any, prior to making a decision that the proposed action would be sustained as a preponderance of the evidence warranted the individual's removal. Appellant was informed in writing of his/her

right to appeal the decision and necessary appeal forms and regulations were provided with the decision letter.

Because the preponderance of the evidence indicated appellant had engaged in an illegal strike against the United States Government as prohibited by 18 USC 1918 and 5 USC 7311, there was basis to believe that the individual had committed a crime for which a sentence of imprisonment could be imposed. Under these circumstances, the agency was within its rights to invoke the "crime provision" and shorten the notice period to a minimum of 7 days (5 USC 7513(b)(1) and (2)). Because the employee chose to withhold services from the public by participating in a strike against the United States Government and being absent without leave, the agency maintains that the removal promotes the efficiency of the service.

The agency has not committed any harmful error in initiating the removal action against appellant. Harmful error has been defined by the Board in *Parker V. Defense Logistics Agency* as "Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful; i.e., caused substantial harm or prejudice to his/her rights." All actions taken were in accordance with existing rules and regulations and are, therefore, consistent with all applicable laws.

F17

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration
Southwest Region

August 21, 1981

Mr. Harold J. DesVignes
14127 Merry Meadow Drive
Houston, Texas 77049

Dear Mr. DesVignes:

My letter of August 8, 1981, informed you of a proposal to remove you from your position of Air Traffic Control Specialist. I have given full consideration to your written submission dated August 17, 1981.

I find that both of the reasons in the letter of proposed removal are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed effective August 24, 1981.

You have the right to appeal this removal to the Merit Systems Protection Board (MSPB), or to grieve the action under the PATCO/FAA agreement, but not to do both. If you elect to appeal this action, you must submit an appeal to the Chief Appeals Officer, Merit Systems Protection Board, 1100 Commerce Street, Dallas, Texas 75242, during the period beginning with the day after the effective date of the removal until not later than 20 calendar days of the effective date. Enclosed is a form which you may use in submitting an appeal and a copy of the MSPB regulations.

If on the other hand, you believe this action violates Article 69 and you choose to file a grievance, you must submit a written grievance to me no later than 15 calendar

days after the effective date of the removal. In this connection you should know that the FAA has filed an Unfair Labor Practice (ULP) charge against PATCO for its role in the strike and is seeking to have the union decertified. The case is now being processed by the Authority, and determination that PATCO committed a ULP could impact on the processing of grievances under the PATCO/FAA agreement. If the union is decertified and the agreement terminated, this avenue of appeal may not be available to you. If you elect to file a grievance, it must be filed in accordance with Article 7, Section 8, of the agreement and submitted on FAA Form 3770.2. The grievance will be processed beginning with step 2 of the grievance procedure in the agreement.

Upon your request, Labor Relations Branch, ASW-16, FTS 736-9276 or commercial number (817) 624-4911, extension 276, will give you further information on appeals procedures to the Merit Systems Protection Board.

Original signed by

ARNOLD E. PRICE
Chief, Houston Center

2 Enclosures.

Appendix G—*Block et al. v. F.A.A.* ___ MSPR ___ (Docket No. DA075281F0892, 1/3/83) MSPB Presiding Officials Decision in the Consolidation Case Which Incorporated DesVignes Appeal.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Dallas Regional Office

RICHARD W. BLOCK *et al.*,[1]

Appellants,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Docket No. DA075281F0892
Date: January 3, 1983

[1] The appellants in this appeal are identified in Appendix A attached hereto. The appellants in this appeal were initially consolidated into the following appeals: *Richard W. Block et al. v. DOT, FAA*, MSPB Docket No. DA075281F0892; *Robert G. Haas et al. v. DOT, FAA*, MSPB Docket No. DA075281F1498; *Steven Alex et al. v. DOT, FAA*, MSPB Docket No. DA075281F1329; and *Michael Arends et al. v. DOT, FAA*, MSPB Docket No. DA075281F1583. On August 6, 1982, the appellants were reconsolidated into the appeals of *Richard W. Block et al. v. DOT, FAA*, MSPB Docket No. DA075281F0892; *Merle L. Browning et al. v. DOT, FAA*, MSPB Docket No. DA075281F1468; *Donald S. Lewis et al. v. DOT, FAA*, MSPB Docket No. DA075281F1476; and *Gary Beller et al. v. DOT, FAA*, MSPB Docket No. DA075281F1405.

DECISION

Introduction

Appellants filed appeals from the actions taken by the Department of Transportation, Federal Aviation Administration, which removed them from their positions of air traffic controller with the Houston Air Route Traffic Control Center, the Houston Intercontinental Control Tower, the Houston Hobby Air Traffic Control Tower, the Beaumont Air Traffic Control Tower, and the David Wayne Hooks Air Traffic Control Tower. A hearing was conducted on this consolidated appeal on September 15 through 18, 1982, at Houston, Texas. In a statement of facts and issues, filed on August 30, 1982, appellants also appealed from allegedly illegal suspension actions effective on the date of the notices of proposed removal.

Jurisdiction

An employee may submit an appeal to the Merit Systems Protection Board (the Board) from any action which is appealable to the Board under any law, rule, or regulation. 5 U.S.C. §7701(a). An employee in the competitive service who is not serving a probationary period has a statutory right to appeal a removal action to the Board. 5 U.S.C. §§7511-7513. A petition for appeal may be filed with the appropriate Board regional office any time during the period beginning with the day after the effective date of the action being appealed, but not later than 20 days after the effective date. 5 C.F.R. §1201.22(b) (1982). An appellant has the burden of proof as to issues of jurisdiction and timeliness of filing. 5 C.F.R. §1201.56(a)(2) (1982).

Each appellant, at the time of his removal, was an employee in the competitive service and was not serving a probationary period. The petitions for appeal were filed

within the required time limits. Accordingly, the appeals of the removal actions are within the Board's jurisdiction.

In a statement of facts and issues filed with the Board on August 30, 1982, appellants alleged that they had been illegally suspended by the agency during the notice period of the removal actions. It is not disputed that controllers who did not report to work by a specified deadline were not allowed to report to work prior to their removal from their positions and that they were placed in a non-duty, non-pay status by the agency pending the completion of the remaining actions. Appellants argued that these actions by the agency constituted de facto suspensions which deprived them of the procedural protections required by 5 C.F.R. Chapter 75. Appellants contended that their failure to raise the suspension issue in the initial petitions for appeal was irrelevant in that the Board's regulations provide that "[f]ailure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of the other parties and unduly delay the proceedings." 5 C.F.R. §1201.24(a)(9) (1982).

Assuming, without deciding, that the agency's actions constitute suspension actions, I find appellants' arguments to be without merit. A careful reading of 5 C.F.R. §1201.24(a)[2] reveals that the Board makes an obvious dis-

[2]5 C.F.R. §1201.24 (1982) provides in part:

(a) *Contents.* Petitions for appeal must be filed by the employee, his/her designated representative or a party properly substituted under §1201.35. Petitions may use any format, including letter form, but must contain the following:

. . . .

(2) The action taken by the agency and its effective date;

. . . .

(9) Signature by the appellant and representative, if any. Failure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of the other parties and unduly delay the proceedings.

tinction between the "action" being appealed and "claims and defenses." The regulation provides that a petition for appeal must at a minimum state "[t]he *action taken by the agency* and its effective date," 5 C.F.R. §1201.24(a)(2) (1982) (emphasis added), and that with respect to that *action*, other *claims and defenses* may be raised in the course of the proceeding so long as there is no prejudice to the other parties and undue delay. 5 C.F.R. §1201.24(a)(9) (1982). I find that the regulations do not contemplate the raising of an issue by any party which would constitute a separately appealable action on which initial determinations of jurisdiction and timeliness would have to be made. Accordingly, I find that the alleged suspension actions have not been raised in such a manner as to bring them within the jurisdiction of the Board, and therefore, arguments and evidence pertaining to those alleged actions will not be considered further herein.

Analysis and Findings

Appellants were removed from the service for two reasons. The first was that each appellant had participated in a strike against the United States Government in violation of 5 U.S.C. §7311 which provides, "[a]n individual may not accept or hold a position in the Government of the United States . . . if he . . . participates in a strike . . . against the Government of the United States . . . " and in violation of 18 U.S.C. §1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed. The

second reason for the removals was the charge of unauthorized absence.[3]

The terms "striking" and "participating in a strike" have been held to mean an actual refusal in concert with others to provide services to one's employer. *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879, 884 (D.D.C.), *aff'd,* 404 U.S. 802 (1971). With respect to the burden of proof necessary to establish a prima facie case of an employee's participation in a strike, the Board has held that evidence of an employee's unauthorized absence from duty and his presence among picketers may constitute a prima facie case of his participation in a strike. *Duckett and Yardley v. Tennessee Valley Authority,* MSPB Docket No. AT07528010325 (February 19, 1982). The Board has also stated that, "In a case, such as this one, in which the existence of a strike is a matter of general knowledge, the agency may establish a prima facie case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike." *Schapansky v. Department of Transportation, Federal Aviation Administration,* MSPB Docket No. DA075281F1130 (October 28, 1982).

In support of the charge that appellants had participated in a strike against the United States Government, the agency furnished documents reflecting the existence of a strike called by the Professional Air Traffic Controllers Organization[4] beginning on August 3, 1981; watch sched-

[3]A decision of an agency to remove an employee shall be sustained by the Board only if the agency's decision is supported by a preponderance of the evidence. 5 U.S.C. §7701(c)(1)(B). A preponderance of the evidence has been defined by the Board to be that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. 5 C.F.R. §1201.56 (c)(2) (1982).

[4]The Professional Air Traffic Controllers Organization will hereinafter be referred to as PATCO.

ules which reflected when each appellant was scheduled to work; personnel sign-in logs and time and attendance records which showed that each appellant had failed to report for work when scheduled beginning on August 3, 1981, and thereafter; and that each appellant had been absent without leave during this period of time.

The agency also provided testimony from each of the five facility chiefs involved in this appeal.[5] The facility chiefs all testified that none of the appellants had reported for duty beginning at 7 a.m. Eastern Daylight Time on August 3, 1981, through their first regularly scheduled shift after eleven o'clock Eastern Daylight Time on August 5, 1981, that none of the appellants had leave or excused absence for that period of time, that none of the appellants had called and indicated that they wanted to report but were somehow prevented from so doing, that none of the appellants had had previous instances of absence without leave, and that none of the appellants had called the facility prior to their receipt of the notice of proposed removal (Tr. pp. 48, 49, 156-160, 544-547, 690-694, and 903-905).

The agency, citing *Ketcham v. Department of Transportation, Federal Aviation Administration,* MSPB Docket No. DA075281F0713 (May 28, 1982), moved that I take official notice[6] that an unlawful strike of air traffic controllers had commenced on August 3, 1981, and continued at least

---

[5]Arnold E. Price was the Chief of the Houston Air Route Traffic Control Center; Francis E. Davis was the Chief of the Houston Intercontinental Air Traffic Control Tower; Curtis D. Jenkins was the Chief of the Houston Hobby Air Traffic Control Tower; Harell R. Edwards was the Chief of the Beaumont Air Traffic Control Tower; and James A. Jones was the Chief of the David Wayne Hooks Air Traffic Control Tower.

[6]A presiding official may take official notice of matters of common knowledge or matters that can be verified. Official notice taken of any fact satisfies a party's burden of proving the fact noticed. 5 C.F.R. §1201.67 (1982).

through August 6, 1981. That motion was granted subject to refutation by appellants.

In an attempt to refute the motion for official notice, the appellants cited the decision of Judge Greene stating that the strike had ended on August 6, 1981, at 8 a.m. *U.S. v. PATCO,* 524 F. Supp. 160 (D.D.C. 1981). The appellants also cited statements made by various high ranking government officials stating that the strike had concluded earlier than August 6, 1981. For example, President Reagan announced on August 3, 1981, at approximately 11 a.m., that if the air traffic controllers did not report for duty within forty-eight hours they would have forfeited their jobs and would be terminated. 17 Weekly Comp. Pres. Doc. 845 (1981). Similarly, on August 5, 1981, Secretary of Transportation Drew Lewis announced that as of eleven o'clock on that date the strike was over. Appellants also relied upon court papers that the government had filed in which the government purportedly admitted that the strike had ended no later than August 8, 1981 (Appellant's Exhibit DD). These factors, however, were all considered by the Board when it issued its decision in *Ketchem* and concluded that it was appropriate to take official notice that the strike conducted by PATCO continued at least through August 6, 1981. *See also Ketchem v. Department of Transportation, Federal Aviation Administration,* MSPB Docket No. DA075281F0713 (Order issued November 23, 1982). On consideration of the record, I find that appellants have not presented sufficient evidence to refute the basis for taking official notice that the strike conducted by PATCO continued at least through August 6, 1981.

Ten of the appellants in this appeal were charged with participating in a strike on dates subsequent to August 6, 1981. These dates range from August 7, 1981, through August 16, 1981. In *Ketchem*, the Board held that where an employee is charged with participation in a strike on a date

subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that the strike was in fact in progress on the date charged and that the employee could have returned to work on that date.

In order to show that the strike conducted by PATCO had continued past August 6, 1981, the agency submitted a transcription of a tape recording which was available by calling the Washington headquarters of PATCO. The agency asserted that the message in question had been taped on September 21, 1981. In that message, Robert Poli, the President of PATCO, stated, "[i]t's been a tough strike, it's been a long strike, but . . . pick your head up, hold it high as being the kind of people who are proud to be on strike, even as difficult as it is, and know that our cause is worthwhile. If we get that reinstilled in all of us, we will prevail" (Exhibit R-XXX-272). The agency also submitted two copies of PATCO Presidential Updates, dated September 25, 1981, and October 8, 1981. The September update contains, *inter alia,* the following statements, "[a]s the eighth week of this strike draws to a close . . . "; "[a]s this strike continues, indications mount that the Reagan Administration is being pressured to settle"; and "I must convey to you my strong belief that we can and will win this strike" (Exhibit R-XXX-272). The October update contains, *inter alia,* the following statements, "[a]s I write this letter, we are now 67 days into a strike that many of you thought would last no more than a few days or weeks" and "I cannot tell you that the strike will end soon . . ." (Exhibit R-XXX-272). The agency also submitted the supplemental opinion of Ronald W. Haughton, Chairman, Federal Labor Relations Authority, in which he stated that the FLRA had found that the strike by PATCO was still in existence on October 22, 1981. *PATCO v. Federal Aviation Administration,* 7 FLRA No. 10 (October 22, 1981).

Mr. Price testified that picketing at his facility had continued into October of 1981 (Tr. pp. 866, 867). Mr. Davis testified that picketing at his facility had lasted through Labor Day (Tr. p. 676). Ms. Marion Hein, Special Agent, and Mr. Keith Rogers, Military Liaison and Security Officer, testified that they had been assigned to take photographs of employees engaging in picketing activities at the Houston Center throughout the month of August. Ms. Hein testified that she observed such picketing, that the picketers carried signs that said "on strike", and that such picketing lasted throughout the month of August (Tr. pp. 196, 197). Mr. Rogers testified that he had taken pictures of picketing activities through August 29, 1981, and that the picketers had carried signs stating that they were on strike (Tr. pp. 240, 241).

The agency also submitted a number of photographs which had been taken by Ms. Hein and Mr. Rogers which support the position of the agency that the strike conducted by PATCO lasted well after August 6, 1981. These photographs show many of the appellants engaging in picketing activities outside of the Houston Air Traffic Control Center and carrying signs which stated "AFL-CIO PATCO Air Traffic Controllers on Strike," "PATCO Air Traffic Controllers on Strike," and "PATCO Strikes". These photographs were taken at various times between August 4 and August 29, 1981. The agency also submitted a number of statements from controllers and supervisory personnel concerning the existence of picketing at the Houston Air Route Traffic Control Center from August 3, 1981, through September 4, 1981 (Exhibits R-ZHU-191 through R-ZHU-220).

The appellants in this appeal did not present any evidence with respect to the question of the duration of the strike conducted by PATCO other than that which has already been considered in the discussion on taking official notice under *Ketchem, supra.* That evidence and argument can-

not be determinative of the question of whether the strike existed past August 6, 1981, since it primarily supports the proposition that the strike ended no later than August 6, 1981, at 8 a.m. The Board, in *Ketchem, supra,* explicitly rejected that argument when it took official notice that the strike continued at least through August 6, 1981.

Although it is true that much of the evidence submitted by the agency to support the proposition that the strike continued past August 6, 1981, consisted of hearsay evidence, the Board has held that such evidence is admissible in administrative hearings and that it remains for the presiding official to weigh the probative value of that evidence in light of the cirumstances of the particular case. *Jackson v. Army,* MSPB Docket No. AT07528110273 (February 3, 1982); *Borninkhof v. Department of Justice,* MSPB Docket No. SF075209008 (February 27, 1981). It is further noted that none of the appellants, who were charged with striking on dates subsequent to August 6, 1981 elected to testify at the hearing. The Board has held that an appellant's exercise of his fifth amendment right not to testify does not preclude a presiding official from drawing an adverse inference from that refusal. *Book v. United States Postal Service,* MSPB Docket No. SL07528010067 (May 26, 1981), *aff'd,* 675 F.2d 158 (8th Cir. 1982). In this case, those appellants who were charged with striking after August 6, 1981, presented no response to the agency's assertions and evidence that the reason for their failure to report for duty when scheduled, after August 6, 1981, was because they had participated in the strike. Under these circumstances, I find it is appropriate to draw an adverse inference from the appellants' failure to testify. On consideration of the record, I find that the agency has shown that it is more likely to be true than not true that the strike conducted by PATCO which commenced on August 3, 1981, was still in existence at least through and including August 16, 1981.

It still must be determined whether the appellants who were charged with striking after August 6 would have been allowed to return to work on the date of which they were charged with striking. Nine of the ten appellants in this appeal who were so charged had been employed at the Houston Air Route Traffic Control Center. Mr. Price testified that an employee was not to be issued a notice of proposed removal as long as he reported by his deadline (Tr. pp. 865, 866). He testified that one employee had met his deadline a week to ten days after August 8 because he had been on annual leave and the agency had been unable to contact him to cancel that leave (Tr. p. 898). The other appellant who was charged after August 6, 1981, had been employed at the Beaumont Air Traffic Control Tower. Mr. Edwards testified that a striking controller by the name of Wayne Brodd had been allowed to report for duty by his deadline. He also declared that no other striking controller had contacted him or any of his supervisors prior to the start of his deadline shift (Tr. p. 79).

The record contains further evidence that the appellants charged with participating in the strike after August 6 could have reported to duty on their deadline date. For example, the agency's file submitted in the appeal of appellant John R. Harris (who was charged with participation in the strike beginning on August 15 , 1981) shows that he called his facility on August 15, 1981, and requested sick leave. Assistant Chief Mike Thompson wrote a memorandum of that conversation which is dated August 15, 1981. Mr. Thompson stated that he disapproved appellant Harris' request and told him that he should report for duty as scheduled on August 15 at 4 p.m. He informed Mr. Harris that if he did not report he would be considered absent without leave and participating in the strike. Mr. Thompson then stated "John acknowledged this information and said that he would consider it but that he did not think that he would be in."

Appellant William B. Harvey was charged with participating in the strike beginning on August 9, 1981. The agency submitted a memorandum from Gilbert A. Bode, who was appellant Harvey's supervisor. In that memorandum, Mr. Bode stated that he had made a telephone call to Mr. Harvey while he was on military leave and that he "directed William B. Harvey Jr. to report for work at the Houston ARTCC on Sunday 8-9-81 at 1500 CDT."[7]

In the agency's file submitted in the appeal of Albert L. James, there are a number of memoranda from appellant James' supervisor. In those memoranda, the supervisor stated that he had talked to appellant James' daughter and told her that his leave had been cancelled and that he should report to work. The supervisor talked to appellant James' daughter again on August 6, 1981, and she told him that he had received the message. On August 8, 1981, the supervisor personally talked to appellant James and told him that his annual leave was cancelled and that he should report to work at 7 a.m. on August 9, 1981. Finally, the supervisor called appellant James again on August 9, 1981, at 5:50 a.m. and, at that time, Mr. James told him that he was not coming to work.

As previously discussed, all of the facility chiefs testified that none of the appellants had contacted them and indicated that they wanted to report to work but were somehow prevented from so doing. Furthermore, none of the appellants who were charged with striking after August 6, 1981, presented any evidence to show that they had attempted to report for work by their deadline after August 6, 1981, and had been refused permission to do so by the agency. Accordingly, I find that the agency has shown by a preponderance of the evidence that any striking controller could have returned to duty for his first regularly sched-

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[7]1500 is the FAA's terminology for 3 p.m.

uled shift after 11 a.m. on August 5, 1981, and specifically that the ten appellants charged with striking after August 6, 1981, could have returned to work on the dates that they were charged with participating in the strike.

Since I have taken official notice of the existence of the strike by PATCO from August 3 through August 6, 1981, and since I have found that the agency has shown by a preponderance of the evidence that the strike continued at least through and including August 16, 1981, and since the agency provided uncontroverted evidence that each of the appellants was absent without authorization during the strike as charged, I find that the agency has established a prima facie case of each appellant's voluntary participation in a strike against the government and unauthorized absence as charged.

As the Board noted in *Schapansky, supra,* the ultimate burden of establishing each appellant's participation in the strike remains on the agency. Nevertheless, the Board stated that once the agency establishes a prima facie case the burden of persuasion would then shift to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike.

All of the appellants in this appeal were represented by the law firm of Richard J. Leighton or by PATCO. A joint statement of facts and issues was filed in their behalf on August 30, 1982. (Appellate File, Tab 47). Consideration of individual circumstances for these appellants will be limited only to those facts and issues raised in the joint statement of facts and issues and only as to those appellants for

whom those representatives indicated those facts and issues were applicable.[8]

Appellants alleged that because of wide spread confusion over the agency's application of President Reagan's deadline the agency was estopped from alleging that they would have been allowed to report for work after 11 a.m. on August 5, 1981. The agency implemented the general policy enunciated by the President in a slightly more flexible manner than might have been inferred from his remarks. *See* GENOT 127, Appellate File, Tab 12. The "moratorium" or "grace period" served to render the ATC cases distinguishable from the normal or common federal personnel action. I cannot find, however, that the situation in any way prejudiced the rights of appellants.

The plain meaning of the President's remarks was that striking controllers were given an option to cease and desist from their otherwise actionable misconduct. The agency was given the authority, and implicitly the responsibility, of determining whether to take personnel actions against individual controllers. An employee who had participated in the strike on August 3-5 could return to work if he chose.

[8]Several appellants raised claims in their oral and/or written replies or in their petitions of appeal. In the Board's Order Providing for Consolidation, Amending Pre-Hearing Orders and Orders Relating to Service (February 1, 1982), the parties were ordered to file statements of facts and *all* issues alleged. This decision will make no findings on any claims or issues not raised in the statement of facts and issues. *See Lane v. Geiger-Berger Assoc., P.C.*, 608 F.2d 1148 (8th Cir. 1979); *Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975), cert. denied*, 430 U.S. 954 (1977); *Bettes v. Stonewall Insurance Co.*, 480 F.2d 92 (5th Cir. 1973); and *Helis v. Usry*, 464 F.2d 330 (5th Cir. 1972). In a few instances, appellants attempted, in their closing argument, to resurrect issues or to initiate new claims not raised in the statement of facts and issues. These belated attempts must fail, however, since a post-trial memorandum cannot be used to raise an issue which had not been included in the statement of facts and issues in compliance with the Board's above mentioned Order. *See G & R Corp. American Security & Trust Co.*, 523 F.2d 1164 (D.C. Cir. 1975).

Rather than harming appellants, the President's remarks (which were widely disseminated in the visual and print media) served to benefit the employees in question by clarifying the government's intended actions in response to the 7:00 a.m., August 3 job action in further specifying the effect of the policy on an individual's employment status. The clear import of the President's remarks was that individual employees had not been, and would not be, disciplined prior to the conclusion of the grace period. Moreover, the appellants failed to provide any evidence to show that any of them were actually confused over the application of the deadline, and the facility chiefs testified that none of the appellants had called to ascertain whether they could or could not report to work.

Appellants also alleged that the agency had, by locking them out or telling them that they were fired, prevented them from reporting to work for their first scheduled shift after 11 a.m. on August 5, 1981, and had thus denied them the opportunity to take part in the President's grace period. The only appellant to provide any evidence with respect to this allegation was Edward R. Stout. He testified that facility chief Edwards had telephoned him on the morning of August 4, 1981, and asked him if he would work overtime. He declined to work overtime because he was tired and, at that point, Mr. Edwards said "[w]ell, we'll see about that. That's all for you" (Tr. p. 89). Mr. Stout testified that he understood this statement to mean that he was fired because of the anger in Mr. Edwards' voice and the fact that they had never gotten along very well (Tr. p. 90).

Mr. Edwards stated that he had called appellant Stout on August 4 and ordered him to come to work because there was a strike and his presence was needed at the facility. He averred that Mr. Stout refused to come to work and stated that he would like to but that he had better not. At that point, Mr. Edwards stated that he concluded the conversa-

tion by saying "Okay. Goodbye" (Tr. p. 71). Mr. Edward specifically denied that he had stated anything to the effect of "we'll see about that, that's all for you" (Tr. p. 71). I find Mr. Stout's recollection of the telephone conversation less credible than Mr. Edwards' recollection. Mr. Stout admitted that he had voted for a strike in June of 1981, that he was aware of the strike in August of 1981, and that he had never contacted the facility until after he received the notice of proposed removal (Tr. pp. 91, 93, 96). Furthermore, Mr. Stout's claim that he had not reported for duty because he believed his facility chief had fired him on August 4, 1981, was raised in a general way for the first time in the statement of facts and issues, and it was not until the time of the hearing that the specifics behind his contention were revealed to the Board or to the agency. Appellant did not raise this claim in his replies to the notice of proposed removal. The Board has held that an appellant's failure to deny a charge when responding to a notice of proposed adverse action makes a subsequent denial entitled to less weight. *Risner v. Federal Aviation Administration,* MSPB Docket No. SL075209067 (August 25, 1981). Similarly, Mr. Stout's failure to raise this claim until over a year after the notice of proposed removal was issued renders his claim entitled to less weight. On consideration of the record, I find that appellant Stout has failed to rebut the agency's prima facie case of participation in the strike.

Although the appellants' statement of facts and issues list a number of other appellants who also contended that they had been locked out or told that they were fired and thereby prevented from reporting to work for the first scheduled shift after 11 a.m. on August 5, 1981, none of those appellants provided any evidence to show that any of them had been locked out, that any of them had been told that they were fired, or that any of them had attempted to report for work and had been refused permission to do so. Moreover,

the record in this appeal clearly establishes that striking controllers were allowed to report for work by their respective deadlines. Finally, the Board, in deciding *Ketchem, supra,* determined, while considering the confusion as to the existence and duration of the strike, that a number of controllers could have returned to work after August 5, 1981.

Appellant Donald R. Poore alleged that he had been on approved annual leave from July 30 through August 6, 1981, and that he had received no notice of cancellation of that leave.[9] Mr. Poore did not testify or submit any other evidence to support this allegation. The record shows that Mr. Poore was charged with striking beginning on August 3, 1981, at 10 a.m. The watch schedule which was submitted by the agency shows that Mr. Poore had been scheduled for annual leave but that the leave had been cancelled. In addition, Mr. Jones testified that Mr. Poore's leave had been scheduled in conjunction with a familiarization flight. Mr. Jones averred that when Mr. Poore picked up his tickets for the flight, he had been briefed that in the event of a strike all leave was cancelled and that he should call the facility at eight a.m. on August 3, 1981, but Mr. Poore had failed to do so (Tr. pp. 148, 164). Thus while the record shows that appellant Poore had originally been scheduled for annual leave, the evidence shows not only that his leave was cancelled by the agency but also that he was so notified. Finally, since appellant's claim was raised for the first time in the statement of facts and issues, filed on August

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[9]Appellant Poore was the only appellant who is listed in the statement of facts and issues as claiming that he did not receive notification of cancellation of his annual leave. However, at the hearing, appellant David R. Burns attempted to raise this defense. For the reasons previously expressed in this decision, appellant Burns may not raise that issue. Moreover, even if it were found that appellant Burns was allowed to raise this issue, the record evidence conclusively shows that he did receive notice of the cancellation of his annual leave (see Tr. pp. 32, 33, 130-132).

30, 1982, that claim is not entitled to great credibility. *See Risner, supra.*

Appellants David R. Burns, Edward G. Gowler, Alex Guzman, Albert James, and Donald R. Poore claimed that they had been on approved annual leave during all or part of the period for which they were charged with striking and unauthorized absence and that the agency's attempt to cancel their leave was invalid. The appellants argued that the cancellation efforts were "invalid" because the FAA-PATCO collective bargaining agreement provided that annual leave could only be cancelled in the event of an operational emergency or at the request of the employee. None of the appellants had requested that their annual leave be cancelled, and they argued that no such emergency could have existed prior to August 3, 1981. Therefore, the agency's notification of leave cancellation prior thereto was invalid.

The testimony of the facility chiefs, and the deposition of Richard Failor, Chief, Air Traffic Division, Southwest Region, show that the agency had promulgated a policy of cancelling all scheduled annual leave in the event of a strike (*See* appellants Exhibit KK). Efforts to notify all controllers of this policy included placement of notices to this effect in mandatory reading binders and personal notification by supervisors. Pursuant to this policy, the appellants were notified that their leave was cancelled.

Appellants' argument fails since they have failed to show that no operational emergency existed, or that a violation of Article 28, the controlling provision of the collective bargaining agreement, even if it had occurred, rendered the leave cancellations invalid.

With respect to the existence of an emergency, it is plain that an operational emergency existed as a result of the job action on August 3, 1981. *See Schapansky, supra; Ketchem, supra.* In addition, it cannot credibly be denied that the possibility of the occurrence of such an opera-

tional emergency was reasonably foreseeable. The appellants have cited no provisions of the contract nor offered any evidence or argument as to the existence of any mandatory procedures required to formally proclaim that an emergency exists, or is predictably about to exist. Absent such evidence, I find that the contract requires only a determination as to the existence or reasonable likelihood of the existence of an operational emergency in order to permit the agency to prospectively cancel approved advanced leave or to actually so cancel such leave during the duration of the emergency. To interpret the contract as requiring a "formal" declaration of an operational emergency, or to require that the emergency actually occur before leaves might be cancelled is unreasonable and elevates form above substance.[10] It is more reasonable to conclude, instead, that the contract provisions were intended to cover the circumstances which existed in the instant case. I find, therefore, that the agency did not violate the collective bargaining agreement in cancelling the appellants' leaves. Accordingly, their leaves were effectively cancelled, and the appellants have not rebutted the agency's prima facie case of participation in the strike and unauthorized absence.

Finally, even if the leave cancellations were in violation of the contract, such a violation does not render that action invalid per se or otherwise establish the existence of any harmful procedural error. The courts and the Board have held that individuals do not have unfettered discretion to disobey or ignore agency orders which may later be

[10]The Board has held that it, and its presiding officials, have the authority and the responsibility to interpret collective bargaining agreement provisions where necessary for resolution of a matter. This is particularly true since contracts are enforceable against an agency and have the force of regulation. *Giesler v. Department of Transportation,* 3 MSPB 367 (1980).

found to have violated a collective bargaining agreement or to be otherwise not in accordance with law. *Gragg v. Department of the Air Force,* MSPB Docket No. DA07528010134 (September 16, 1982), citing *Walker v. City of Birmingham,* 388 U.S. 307 (1967). Redress for appellants' claims concerning the cancellation of leave was available under the contract through established grievance procedures. Accordingly, their failures to report for duty as ordered on the dates indicated were not reasonable or justified, even if the orders were in violation of the contract. *Compare, Whirlpool Corporation v. Marshall,* 445 U.S. 1 (1980).

It was also alleged in the statement of facts and issues that three appellants had been on approved sick leave during all or part of the period for which they were charged with striking and unauthorized absence. These appellants were identified as Darryl L. Either, allegedly on sick leave from August 2 through August 7, 1981; Gerald B. Hall, allegedly on sick leave from July 31 through August 7, 1981; and John R. Harris, allegedly on sick leave on August 14, 1981. There is no appellant in this appeal by the name of Darryl L. Either. There is, however, an appellant by the name of Darryl L. Eitel for the purposes of this decision, it will be assumed that the statement of facts and issues meant to refer to Darryl L. Eitel.

None of the appellants raised the claim that they were on approved sick leave prior to the filing of the statement of facts and issues. As noted above, an appellant's failure to raise a defense until over a year after he is charged with an offense detracts from the credibility of that defense. *Risner, supra.* Moreover, none of these three appellants provided any testimony or other evidence in support of their claim that they had been on approved sick leave.

In addition, the case files submitted by the agency do not support the appellants' claims. For example, in the file

submitted in the appeal of Mr. Eitel, there is no reference in the watch schedules, the personnel logs, or the time and attendance records that Mr. Eitel had been scheduled for sick leave on the dates he claimed. Since Mr. Eitel failed to present any evidence to show that he was on sick leave, I must find that he has failed to rebut the agency's prima facie case.

Similarly, the agency file submitted in the appeal of appellant Hall fails to provided any supporting evidence for his claim that he was on sick leave on the dates claimed. Again, neither the watch schedules, the personnel logs, or the time and attendance reports show that appellant Hall was on approved sick leave during the time that he was charged with being on strike. Moreover, appellant Hall's file contains a Houston Center Manpower Availability Form[11] which shows that he told his supervisor he would not report for duty for his next scheduled duty time. Thus, I find that appellant Hall has failed to rebut the agency's prima facie case of participation in the strike and unauthorized absence.

Finally, the case file submitted for the appeal of appellant Harris shows that he was not on sick leave at the time he was charged with striking. Appellant Harris was charged with striking beginning on August 15, 1981. Appellant Harris only claimed that he was on sick leave on August 14, 1981, and therefore, even if his claim were true, it would not effect the fact that he was charged with striking on the following day. Moreover, the agency file submitted with respect to Mr. Harris shows that he called the facility on August 15, 1981, and asked his supervisor for further sick leave and that that request was specifically disapproved and he was ordered to report for duty. Ac-

[11]This form, which was dated July 30, 1981, was used by the Houston Center to help determine which employees intended to report for work in the event of a strike.

cordingly, I find that appellant Harris has also failed to rebut the agency's prima facie case of participation in the strike and unauthorized absence.

It was also alleged in the statement of facts and issues that appellants Allen J. Braden, Gerald B. Hall, John R. Harris, William B. Harvey, and Donald R. Poore had personal circumstances which prevented them from reporting to work for their first scheduled shifts after 11 a.m. on August 5, 1981, and that they were thus denied the opportunity to take part in the President's moratorium or grace period. The statement of facts and issues submitted by the appellants states that the evidence to support this allegation would be the appellants' testimony. None of the appellants testified concerning this allegation. Since there was no other evidence presented in support of this allegation, I can only speculate as to the possible reasons which allegedly prevented the appellants from reporting to duty. Absent any evidence presented by these appellants, I find that they have not rebutted the agency's prima case that they were on strike and absent without leave as charged.

None of the appellants presented any other evidence or argument to show that they had no knowledge of the existence of the strike or that their absence was due to some factor other than intentional participation in the strike. Accordingly, I find that the agency has supported its charges against the appellants by a preponderance of the evidence.

Although I have found the charges to be supported by a preponderance of the evidence, an agency's decision to remove an employee may not be sustained if the employee (1) shows harmful error in the application of the agency's procedures in arriving at such decision; (2) demonstrates that the decision was based upon any prohibited personnel practice described in 5 U.S.C. §2302; or (3) shows that the

decision was not in accordance with law. 5 U.S.C. §7701(c)(2).[12]

The statement of facts and issues identified sixty-seven appellants who alleged that the agency had committed procedural error in that they had been denied the opportunity to make a meaningful oral reply. 5 U.S.C. §7513(b)(2) provides that an appellant is entitled to a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer. Appellants set forth two reasons in support of their argument that they had been denied a meaningful opportunity to reply. First, they stated that President Reagan's statement on August 3, 1981, that all controllers who did not report for work within forty-eight hours would be terminated, meant that he was the de facto proposing and deciding official and that none of the appellants had been allowed to present to reply to him or to see the material that he had relied upon in making his decision. Contrary to the appellants' allegations in this matter, there is no evidence in this record to show that the President terminated any controller. All of the controllers in this appeal were terminated by the respective facility chiefs based upon their determinations that each appellant had participated in the strike. Each facility chief who received replies testified that he had considered the replies (Tr. pp. 51, 549, 696, 697, 908). Moreover, GENOT 141, which contained guidance to deciding officials concerning the consideration to be given responses from controllers, specifically instructed deciding officials to exercise management judgement (Appellants Exhibit D). This GENOT listed various factors which should be considered by the deciding officials, but stressed that the most critical factor in their decision was "sound management judgement."

[12]An appellant has the burden of proof as to such affirmative defenses. 5 C.F.R. §1201.56(b) (1982).

Finally, the agency's response to Discovery Order No. ALJ-1 shows that nationwide the agency determined not to remove seventy-two controllers who had been charged with striking (Appellants Exhibit II). Thus, it was the facility chiefs, and not the President, who were the deciding official in these actions.

Appellants also contended that they had been denied a meaningful opportunity to reply in that the agency had followed a policy that all controllers found to have participated in the strike were to be removed. There is no evidence in this record that the deciding officials in this appeal had reached a predetermined decision to fire all of the appellants. What was predetermined was that those employees who were found to have participated in the strike and who failed to return to work prior to their deadlines had committed such serious acts of misconduct as to warrant removal without consideration of lesser penalties. Each appellant had an opportunity to present evidence to the deciding officials that he had not participated in the strike. Accordingly, I find that the action of the agency in predetermining that all controllers found to have participated in the strike would be removed has not been shown by the appellants to have violated any procedural requirement.

These sixty-seven appellants also alleged that they had been denied the opportunity for oral replies. The appellants submitted no evidence to show which, if any, of them had been denied the opportunity for an oral reply. Although the record does show that many appellants in this appeal did not make an oral reply, there was no showing that they had been denied the opportunity to make one. The agency presented evidence to show that all employees were given the opportunity to make an oral reply. For example, Mr. Price testified, without contradiction, that any employee who requested an oral reply

received one "as long as they called within the deadline period" (Tr. p 921). The clear import of this testimony was that any employee who contacted the center within seven days after receipt of the notice of proposed removal and asked for an oral reply was granted one. In further example, Mr. Jones testified that none of the appellants from his facility had asked for an oral reply (Tr. pp. 170, 171, 183). There was no evidence submitted by the appellants to show that any of the appellants at that facility had asked to have an oral reply or written reply and that that opportunity had been denied.[13] Moreover, in each case in this appeal, each appellant was notified by the agency that he could submit a written or oral reply or both within seven days of his receipt of the notice of proposed removal. Absent any evidence provided by the appellants to show that any of them had asked for and been denied the opportunity to make an oral reply, I must find that their allegation is not supported by the evidence. Finally, assuming *arguendo* that error has been shown in this matter, appellants failed to make any showing as to how the alleged error had harmed them.[14]

Appellants next alleged that the agency had violated 5 U.S.C. §7513(b)(2) in that the letters of proposed removal stated that the appellants, "may reply to this notice . . .

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[13]The agency files submitted for that facility show that the appellants sent a form letter to Mr. Jones requesting extensions of time in which to make an oral reply. These requests for extensions of time were denied, and appellants were informed that they could arrange time for an oral reply by immediately contacting Mr. Jones by telephone. Thus, all of these appellants could have

[14]Harmful error has been defined as error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his rights. 5 C.F.R. 1201.56(c)(3) (1982).

within seven calendar days after you receive this letter." Appellants argued that this required a response in less than seven days and therefore, in accordance with the Board's opinion in *Ratley v. Department of the Army,* MSPB Docket No. AT07528110338 (September 17, 1982), the actions were reversible. In *Ratley* at 6, 7, the Board held:

> Because 5 U.S.C. §7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law. *See Land v. Federal Aviation Administration,*MSPB Docket No. CH07528110154 at 4 (July 21, 1982). In the instant case it is undisputed that appellant was given only 1 day to reply to the proposed suspension notice. Contrary to the presiding official, we find that a suspension taken without complying with the procedural requirements of 5 U.S.C. §7513(b)(2) clearly constitutes harmful error under 5 U.S.C. §7701(c)(2)(A).

The statutory procedures governing removal actions are set out at 5 U.S.C. §7513. Sections (b)(1) and (b)(2) thereunder prescribe time limits for notice to the employee of at least thirty days, and a reply period of at least seven days. The Board has had on a number of occasions the opportunity to consider whether failure to comply with these limits constitutes error "per se," or whether the effect of the error must be considered under the "harmful error" standard enunciated by the Board in *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980).

In considering the effect of procedural errors under 5 U.S.C. §7513, the Board has focused on whether the em-

ployee's ability to defend against the charges was impaired by the error, *Hunger v. Department of Interior*, 2 MSPB 274 (1980), or whether the error otherwise had a likely effect on the agency's action, *Graham v. Postal Service,* 2 MSPB 377 (1980). Relying on *Hunger*, the Board later held in *Cade v. Postal Service*, MSPB Docket No. SF07528010370 (November 24, 1981), that the notice of charges is designed to afford the employee opportunity to defend himself, and that a failure to afford him the full period of time required therein is not reversible error absent a showing of harmful error by appellant. Citing *Cade*, the Board affirmed in *Gallego v. Department of Navy*, MSPB Docket No. SF07528110759 (July 21, 1982), application of the harmful error doctrine by holding that the shortening of the notice period by seven days was error. The Board, however, also found that the error did not warrant reversal of the removal action under 5 U.S.C. §7701(c)(2) and 5 C.F.R. §1201.56(a)(3). *Id.* at 3.

Simultaneously with *Gallego*, the Board issued its decision in *Land v. Federal Aviation Administration*, MSPB Docket No. CH07528110154 (July 21, 1982), and discussed in detail the legislative history of the 5 U.S.C. §7513(b)(2) seven day reply requirement. Stating in dicta that failure to give seven days to respond is "not in accordance with law," the Board reversed the initial decision on other grounds.[15] The first decision in which the Board had directly before it a case involving less than seven days to reply was *Johnson v. Department of Treasury*, MSPB Docket No. DC075209213 (August 27, 1982). In *Johnson*, appellant's suspension was proposed on December 31, 1979. The notice was received by appellant on January 2, 1980, and ap-

[15]The initial decision reversed the action on grounds that the agency had improperly invoked the "crime provision" to shorten the thirty day notice period required by 5 U.S.C. §7513(b)(1). The Board reversed and remanded the case for a decision on the merits.

pellant did not reply to the suspension. The agency issued its decision six days later, notwithstanding notice to appellant that she had seven days from receipt of the notice to reply orally and in writing. The Board, after considering *Graham*, *Hunger*, *Gallego*, and *Cade*, *supra*, concluded that although "shortening of the reply period to less than seven days was error," appellant had not demonstrated prejudice to her ability to present her case or that the error "likely had a harmful effect upon the outcome before the agency." In *Ratley*, issued less than three weeks later, the Board then held that allowing Ratley only twenty-six hours to reply was a violation of the law under 5 U.S.C. §7701(c) (2)(C), and constituted clear harmful error. In this respect the *Ratley* decision is somewhat inconsistent with the cases decided by the Board under *Cade*, *supra*, holding statutory procedural violations subject to the harmful error doctrine, and *Graham*, *supra*, holding regulatory procedural violations subject thereto.[16] However, *Ratley* did not reverse any of these holdings, nor did it reverse the Board's decision in *Johnson*, *supra*, that less than the full seven days to reply does not mandate automatic reversal per se, but that violation thereof is subject to review under the harmful error standard enunciated by the Board in *Parker*, *supra*. Accordingly,

[16]Under the rules of statutory construction, effect must be given to every word, clause and sentence of a statute, if at all possible, so that no provision will be superfluous, inoperative or insignificant. *American Radio Relay League v. Federal Communications Commission*, 617 F.2d 875 (D.C. Cir. 1980). This rule is violated if statutory procedural errors are the basis for automatic reversal on grounds they are not in accordance with law because both regulations and statutes have the force of law. *See Pearce v. Department of Labor*, 647 F.2d 716, 726 (7th Cir. 1981). Thus, both statutory and regulatory violations must be reviewed under the same standard and only the "harmful error" standard permits logical application. If the "not in accordance with law" provision were applied to both, for example, the harmful error standard would have no effect since no procedures would be subject thereto.

I find in accordance with *Johnson*, *supra*, that the harmful error doctrine applies in the instant case.

The statement of facts and issues identified forty appellants who had made replies within less than seven days. Although it is true that many of the appellants in this appeal did reply in less than seven days[17] there was no evidence provided by any appellant that he or she was forced to make a reply in less than seven days time. It is also important to note that the appellants' contention implicitly contains the assertion that the dates on which the replies were tendered terminated the reply period. There is no basis either in reason or in law for this proposition. Absent a showing that the appellants were compelled to reply sooner than seven days from their receipt of the notices, it would appear that the replies were entered voluntarily by the appellants as scheduled by them individually or through their representatives. Moreover, the record shows that, with respect to the forty appellants identified in the statement of facts and issues, the notices of decision to remove were not issued until more than seven days had elapsed from the time the notices of proposed removal were received. Accordingly, on consideration of the record, I find that the dates on which the oral replies were made were scheduled with the appellants' consent where they were held in less than seven days from the receipt of the notice of proposed removal and did not limit the seven day time in which the replies *could* have been scheduled. I find, therefore, that the appellants have failed to show that the agency denied them the full seven

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[17]Some of the appellants replied on the seventh day after they had received their notice of proposed removal. I find that this is in compliance with the statutory requirement. FED. R. CIV. P. 6 provides, for example, that in computing any period of time prescribed or allowed by those rules or by any applicable statute the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or a legal holiday.

days mandated by statute in which to reply to the notices of proposed removal. Assuming, *arguendo*, that appellants had been permitted less than the full seven day period to reply, and therefore, error had been shown, reversal in this case would not be required since the appellants failed to present any evidence to establish that the alleged error had been harmful.

Appellants next alleged that the specification in the notice of proposed removal concerning the charge of unauthorized absence was vague in that it did not specify the exact number of days each appellant was allegedly absent without leave. I find this allegation to be unsupported by the evidence of record. Although it is true that the notices of proposed removal did not specify exactly how many days appellants had been absent, the notices did inform each appellant as to when his alleged absence without leave had begun. Accordingly, I find that the notices were sufficiently specific to place the appellants on notice that they were being charged with absence without leave and on which dates the charges began. Furthermore, none of the appellants presented any evidence to show how the alleged vagueness of this charge had harmed them.

Although not entirely clear, it appears that appellants may also have alleged that the agency had committed error, with respect to the removal action, by illegally suspending them during the notice period. Assuming *arguendo* that appellants had been illegally suspended, there has been no showing as to how this error had any impact upon the decision to remove them. Therefore, I find that appellants have failed to show harmful error in this matter.

Appellants next contended that the penalty of removal was too severe in light of the factors set forth in the Board's decision in *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981), and that the penalty of removal should be mitigated because of the

"gross disparity" in the treatment of striking controllers who returned by their deadlines and who were not removed and those who did not return and who were removed.

In *Schapansky*, *supra*, the Board noted that 5 U.S.C. §1 7311 "can be read to require removal as the mandatory penalty for individual federal employees against whom charges of striking are sustained." The Board declined to decide whether, as a matter of law, mitigation of the penalty pursuant to *Douglas*, *supra*, is foreclosed. Rather, citing the case of *Borsari v. Federal Aviation Administration*, MSPB Docket No. NY075209163 at 5-7 (June 24, 1982), the Board held that even upon application of *Douglas*, *supra*, the penalty of removal could not be deemed clearly excessive or disproportionate to the offense of striking. Moreover, I find no disparity of treatment because all of the striking controllers were permitted the opportunity to return to work provided they did so before the expiration of their respective deadlines. As the Board specifically noted in *Schapansky*, *supra*, it was an appellant's decision to continue striking despite the President's grace period which constituted the particularly egregious conduct in these cases such as to destroy the controller's unique relationship of trust with his employer. Accordingly, appellants' argument notwithstanding, mitigation of the penalty is not warranted on this basis. Furthermore, since the factors considered by the Board in *Schapansky*, *supra*, obtain in this case, I find that the penalty of removal assessed against each appellant in this appeal is reasonable.

Appellants also alleged that their removals did not promote the efficiency of the service. In *Schapansky*, *supra*, the Board held that the removal of a federal employee for participation in a strike against his employer promotes the efficiency of the service. The Board stated that there was a clear and direct relationship between that type of miscon-

duct and both the employee's ability to accomplish his duties satisfactorily and the agency's ability to fulfill its missison. Accordingly, I find that the removals of the appellants promote the efficiency of the service.

Decision

The decisions to remove the appellants are hereby affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 7, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for reveiw must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or,

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. §7703(b)(a)[18] the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit no later than 30 days after appellant's receipt of the Board's final Order or decision.

FOR THE BOARD:

MARK KELLEHER
Presiding Official

[18]As modified by Section 127 of the Federal Courts Improvement Act of 1982, to be codified at 28 U.S.C. §1295(a)(9).

APPENDIX A

APPELLANT	DOCKET NO.
Ahrend, William	DA075281F1455
Aiuvalasit, George S.	DA075281F1487
Alex, Steven	DA075281F1329
Arends, Michael	DA075281F1583
Artis, Ronald L.	DA075281F1403
Augst, Owen	DA075281F1585
Baird, William B.	DA075281F1488
Baker, Vernon	DA075281F1604
Baquet, Allen	DA075281F1422
Barnes, Peter	DA075281F1374
Bassett, Roxanne M.	DA075281F1456
Belcher, James N.	DA075281F1404
Bennett, Janet	DA075281F1394
Blackwell, Michael K.	DA075281F1347
Blain, Robert L.	DA075281F1538
Block, Richard W.	DA075281F0892*
Bonnett, Bobby	DA075281F1423
Boykin, Tony S.	DA075281F1489
Braden, Allen J.	DA075281F1565
Braden, Susan	DA075281F1375
Brooks, William	DA075281F1458
Burns, David R.	DA075281F0890
Burson, Jimmy	DA075281F1605
Carroll,Michael	DA075281F1352
Cartwright, Carl	DA075281F1395
Cartwright, Paul	DA075281F1376
Causey, Charles	DA075281F1407
Champion, Nicholas	DA075281F1396
Chester, Alan L.	DA075281F1469
Chochos, John	DA075281F1587
Clark, Donald	DA075281F1425

Clark, Robert C.	DA075281F1588
Colligan, Keith	DA075281F1589
Cook, Dennis L.	DA075281F1490
Coon, Frederick I.	DA075281F1582
Cornelius, Henry	DA075281F1426
Cowan, Robert	DA075281F1427
Dailey, Donald F.	DA075281F1368
Davis, Steve	DA075281F1590
Dempsey,Jack	DA075281F1322
Dennis, Richard J.	DA075281F1492
DesVignes, Harold	DA075281F1430
Dodd, Terry L.	DA075281F1470
Donahue, Richard	DA075281F1606
Dorman, Jeffrey	DA075281F1378
Dowda, William	DA075281F1591
Dudley, William	DA075281F1323
Dunn, Stephen	DA075281F1540
Dupaty, Edward	DA075281F1408
Easton, Robert	DA075281F1382
Eitel, Darryl	DA075281F1431
Elliott, Frederick	DA075281F1432
Ellis, Patrick	DA075281F1433
Fisbeck, Charles E.	DA075281F1393
Fitzpatrick, Thomas E.	DA075281F1560
Flanary, Sammy	DA075281F1434
Fontes, Alfred	DA075281F1379
Fuller, Robert W.	DA075281F1542
Furlong, Tomas	DA075281F1370
Gaddie, George	DA075281F1460
Garcia, Eduardo	DA075281F1461
Garcia, Manuel	DA075281F1435
Garcia, Sandra K.	DA075281F1493
Garza, Ricardo	DA075281F1592
Garza, Sandra	DA075281F1593
George, Gary D.	DA075281F1367

Godbold, John W.	DA075281F1494
Gonzalez, Leandro	DA075281F1436
Goodwin, Joel B.	DA075281F1495
Gowler, Edward G.	DA075281F1348
Grover, Jacque	DA075281F1594
Gstohl, Ronald	DA075281F1437
Gunn, Kenneth L.	DA075281F1496
Gutshall, Loretta A.	DA075281F1497
Guzman, Alex	DA075281F1366
Halcomb, Larry D.	DA075281F1383
Haley, Frank M.	DA075281F1499
Hall, Gerald B.	DA075281F1567
Hall, Leslie F.	DA075281F1568
Hamous, Bruce A.	DA075281F1569
Hanke, Richard M.	DA075281F1500
Harding, Michael R.	DA075281F1501
Harmon, Edwin L.	DA075281F1543
Harris, John R.	DA075281F1502
Harvey, William B.	DA075281F1578
Hay, Alan J.	DA075281F1410
Hayes, Julian	DA075281F1438
Hellmann, Ronald	DA075281F1330
Henderson, Rex	DA075281F1439
Herbst, Frederick	DA075281F1441
Hesse, Joseph M.	DA075281F1230
Hilburn, Charles	DA075281F1442
Hill, Gary	DA075281F1331
Hill, Robert	DA075281F1462
Hillard, Terry L.	DA075281F1349
Hodlund, Jerry Don	DA075281F1412
Holloway, Wayne M.	DA075281F1570
Holmes, Stuart	DA075281F1443
Holstad, Gerald B.	DA075281F1504
Holton, James	DA075281F1463
Hoover, Richard	DA075281F1328

Hornsby, Samuel L.	DA075281F1471
Howard, Michael	DA075281F1380
Humphries, Thomas	DA075281F1371
Hunter, Dennis L.	DA075281F1360
Huntley, David	DA075281F1464
Hymel, Louis	DA075281F1444
Imfeld, Randy	DA075281F1353
Inn, Kenneth K.	DA075281F1505
Irizarry, Raymond	DA075281F1354
Jackson, James H.	DA075281F1506
James, Albert L.	DA075281F1413
Jenkins, Thomas	DA075281F1398
Johnson, Jerrlean	DA075281F1381
Johnson, Joe C.	DA075281F1507
Johnston, George W.	DA075281F1508
Jones, Benton	DA075281F1446
Juarez, Frank	DA075281F1327
Judkins, Dallas	DA075281F1340
Kerby, James A.	DA075281F1369
Kiersey, Elmo	DA075281F1341
Kinder, Jerry L.	DA075281F1544
King, Frederick	DA075281F0886
King, Robert D.	DA075281F1365
Kingan, Robert C.	DA075281F1473
Klinger, Richard F.	DA075281F1510
Knierim, George M.	DA075281F1511
Knight, Joseph	DA075281F1595
Koch, Francis J.	DA075281F1561
Kramer, Robert D.	DA075281F1512
Lagle, Philip R.	DA075281F0150
Lara, Modesto	DA075281F1361
Lawrence, Dennis A.	DA075281F1513
Lawson, Thomas E.	DA075281F1514
Lee, Charles R.	DA075281F1475
Lee, Ellis	DA075281F1447

Loden, Jean	DA075281F1448
Long, Ray	DA075281F1515
Martinez, Robert	DA075281F1467
Mathews, Barney L.	DA075281F1546
Mattair, Jimmy	DA075281F1355
McCollum, David B.	DA075281F1547
McDonald, James	DA075281F1596
McGillicuddy, Donald	DA075281F1516
McGugin, James P.	DA075281F1517
McIlwain, Gwen M.	DA075281F1548
McKinley, Marilynn	DA075281F1449
Miles, Melvin D.	DA075281F1477
Miller, Glyn H.	DA075281F1478
Miller, Russell	DA075281F1416
Miller, Shirley W.	DA075281F1519
Mittelstadt, Thomas B.	DA075281F1562
Mixon, Howard	DA075281F1450
Mixon, William T. II	DA075281F1350
Moller, Margaret J.	DA075281F1417
Montgomery, Ralph	DA075281F1332
Monypeny, David	DA075281F1572
Moody, Neil S.	DA075281F0891
Morris, Harry H.	DA075281F1521
Morse, Garland D.	DA075281F1522
Motley, John	DA075281F1597
Mulinix, Larry N.	DA075281F1357
Nakunz, William G.	DA075281F1419
Neil, John	DA075281F1338
Nesbitt, James	DA075281F1372
Nichols, David	DA075281F1342
Noble, Roy E.	DA075281F1524
Norris, Wayne	DA075281F1400
Novick, Carolyn	DA075281F1607
Owen, Mark	DA075281F1363
Paucker, Harry R.	DA075281F1526

Petty, Billy D.	DA075281F1549
Phillips, Wayne C.	DA075281F1527
Polansky, Thomas E.	DA075281F1573
Poore, Donald	DA075281F1608
Postlewate, Morris A.	DA075281F1420
Primm, Onnan	DA075281F1373
Pruett, Billy	DA075281F1401
Quintrall, Mickey	DA075281F1598
Ragsdale, John R.	DA075281F1563
Ramirez, Ventura	DA075281F1451
Ramsey, Alan	DA075281F1452
Ray, Joseph H.	DA075281F1550
Realme, Raul	DA075281F0893
Richardson, Michael L.	DA075281F1564
Robinson, Donald A.	DA075281F1479
Rogers, Kyle C.	DA075281F1528
Roy, John C.	DA075281F1579
Sakso, Joseph	DA075281F0895
Salamon, Linda	DA075281F0889
Schimelpfening, Bobby	DA075281F1609
Schooler, Tom W.	DA075281F1574
Schrader, Ken A.	DA075281F1529
Schwab, Jay W.	DA075281F1480
Seirer, Richard K.	DA075281F1551
Sekaly, Bruce C.	DA075281F1386
Selby, David M.	DA075281F1481
Shafer, Richard L.	DA075281F1530
Shane, Thomas	DA075281F0894
Simmons, James	DA075281F1333
Sims, Danny	DA075281F1600
Skarpa, Felix J.	DA075281F1482
Skinner, Donald P.	DA075281F1358
Smith, Robert E.	DA075281F1391
Smith, Terry	DA075281F1584
Spradlin, Robert F. Jr.	DA075281F0025

Stevens, Robert	DA075281F1343
Stewart, David	DA075281F1339
Stout, Edward R.	DA075281F0887
Swarts, Eric	DA075281F1453
Taylor, Robert	DA075281F1336
Templet, Clyde P.	DA075281F1533
Terry, Michael D.	DA075281F1387
Tessimond, Arthur J.	DA075281F1483
Thomsen, William E.	DA075281F1575
Titterington-Mercer, D.M.	DA075281F1484
Turnbow, Wesley	DA075281F1610
Ward, John L.	DA075281F1388
Watson, Jack T.	DA075281F1362
Watson, Richard	DA075281F1601
Weese, John G.	DA075281F1534
Welch, Lewis W. Jr.	DA075281F0026
Wennerstrom, Victor A.	DA075281F1351
Werchan, John	DA075281F1335
West, Floyd R.	DA075281F1389
Whealton, Robert G.	DA075281F1359
White, Larry	DA075281F1602
Wiley, Bill J.	DA075281F1556
Williams, Steven A.	DA075281F1557
Williamson, Billy E.	DA075281F1535
Wilson, Dennis	DA075281F1603
Wilson, Lawrence K.	DA075281F1558
Wolfe, Melvin	DA075281F1356
Young, Harold	DA075281F1537
Zablocki, Michael J.	DA075281F1485
Zajac, David	DA075281F1611

Appendix H—*Alex et al. v. F.A.A.* ____ 17 MSPR 479 (1983) MSPB Board Decision on Appeal From *Block, supra,* Appendix G.

STEPHEN P. ALEX, *et al.*,[1]

Appellants

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION, ADMINISTRATION, *Agency*

DA075281F1329

Merit Systems Protection Board.

Oct. 3, 1983

As Amended Nov. 9, 1983

[1]Appellants covered by this order are listed in Appendix A attached hereto. Appellants' cases were consolidated at the regional level with the cases of other appellants, *Block v. Department of Transportation,* MSPB Docket No. DA075281F0892 (Initial Decision, January 3, 1983), but this order relates only to the appellants listed in Appendix A.

Appendix B of Appellant's Supplemental Brief presents factual arguments pertaining to the appeals of seven appellants, Michael Carroll, Thomas Polansky, Donald Poore, Victor Wennerstrom, James Simmons, Jerry Hoglund, and Buddy Bonnett. These appellants were neither included in the Petition For (illegible) filed by appellants' counsel nor Appendix A of Appellants' Supplemental Brief. Thus, these seven appellants have not timely petitioned for Board (illegible) of the initial decision and the Board will not consider the subsequent allegations made in their behalf.

Air traffic controllers were removed based on charges of participation in a strike against the federal government and unauthorized absence. On appeal, the presiding official sustained the removals and controllers petitioned for review. The Merit Systems Protection Board held that: (1) there was no harmful error in presiding official's determination that Board lacked jurisdiction to hear constructive suspension issue, since no suspensions in fact occurred, and (2) telephone call from agency official in which he instructed controller's wife that controller should return to duty and should call him back was insufficient to cancel controller's previously scheduled annual leave, and thus agency failed to establish a prima facie case of either strike participation or AWOL with regard to controller.

Petition granted; initial decision affirmed in part and reversed in part.

1. Merit Protection 81, 471

There was no harmful error in presiding official's determination that Board lacked jurisdiction to hear issue of whether air traffic controllers were constructively suspended during their removal notice periods, since evidence did not establish that any suspensions in fact occurred.

2. Merit Protection 174

Telephone call by agency official in which official instructed air traffic controller's wife that controller should return to duty and should call official back was insufficient to cancel controller's previously scheduled annual leave, since, at most, it placed controller on notice that agency might cancel his leave, and thus agency failed to establish a prima facie case of either strike participation or AWOL on part of controller.

OPINION AND ORDER

Appellants have petitioned for review of the initial decision dated January 3, 1983, sustaining their removal from the positions as air traffic control specialists at the air traffic control facilities in Houston and Beaumont, Texas. The agency based the removal actions on charges of participating in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918, and unauthorized absence (AWOL).

[1] Appellants claim, *inter alia,* that they were constructively suspended during their removal notice periods. The Board finds, however, because appellants, with the exception of appellant Burns presented no evidence showing that they contacted the agency prior to their removal stating that they were ready, willing and able to return to work, that no suspensions in fact occurred. *See Martel v. Department of Transportation,* 15 M.S.P.R. 141 at 146-147, 149-150 (1983).[2]

Upon consideration of the appellants' remaining contentions, we find that the legal issues raised have been addressed and resolved by the Board;[3] that except for the

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[2]For this reason and because the presiding official did not exclude evidence of any appellant's expressed desire to return to work, the Board finds no harmful error in his determination that the Board lacked jurisdiction to hear the issue. *See Smith v. Department of Transportation,* 16 M.S.P.R. 363 at 367-368 (1983); and *Karapinka v. Department of Energy,* 6 MSPB 114, 115-16 (1981).

Further, because of the Board's resolution of appellant Burns' appeal, below, it is unnecessary to reach the issue of his constructive suspension.

[3]With regard to the legal issues, the apellants' petition for review and the briefs submitted in support thereof are identical to those addressed and resolved by the Board in *Bangerter v. Department of Transportation,* 16 M.S.P.R. 470 (1983).

findings pertaining to appellant Burns, the presiding official's findings as to those legal issues are essentially consistent with ours; and that any inconsistency in the presiding official's determinations on those issues would not affect the outcome of these appeals. In addition, to the extent that the arguments made in the appellants' petition, again excepting those pertaining to appellnt Burns, relate to the presiding official's factual determinaitons, we find that the appellants have not demonstrated any factual error by the presiding official, based on specific references to the record, sufficient to warrant the Board's full review of the record. *See Weaver v. Department of the Navy,* 2 MSPB 297, 299 (1980).

[2] Appellant Burns asserts that the presiding official erred in finding that the agency had properly cancelled his previously scheduled annual leave, which including regular days off extended from July 29 through August 13, 1981, and in his resultant sustaining of the strike participation and AWOL charges. Initial Decision (I.D.) at 17 n.9, 23.[4]

The presiding official found that the leave was cancelled in a telephone conversation between the facility chief and Burns' wife on August 3, 1981. The chief testified that during the call he instructed appellant's wife that Burns "should return to duty—to call me back." Hearing Transcript (H.T.) at 32. The presiding official also noted

[4]The presiding official held that Burns was barred from asserting that he was on uncancelled annual leave because the argument was not raised in a mandated pre-hearing statement of issues and facts; alternatively he found that the argument lacked merit in any event I.D. at 17 n.9. The Board, however, noting that appellant first raised the issue of uncancelled leave in his replies to his proposed removal notice and that there are strong policy considerations for affording employees complete hearings on the merits of thier cases, will fully address this issue.

the portion of the hearing transcript showing that when the appellant finally spoke with the chief on August 12, 1981, he expressed his unequivocal desire to return without indicating that he was unaware that his leave had been cancelled. H.T. at 132-33.

The Board, however, finds that the August 3 call, which Burns' acknowledged, H.T. at 102, was insufficient to cancel his leave. The chief did not give actual notice that the leave was cancelled, nor did the agency establish written or verbal cancellation by any other notification. We find that the chief's expressed desire for Burns to return to duty or call the agency was sufficient, at most, to place Burns on notice that the agency might cancel his leave. However, the agency did not effectively cancel the leave prior to proposing his removal.[5] Thus, the agency failed to establish a *prima facie* case of either Burns' strike participation or AWOL. Rather, its action was improperly taken on the basis of approved leave. *See Webb v. United States Postal Service,* 9 MSPB 749 at 752-54 (1982).

Accordingly, the petition for review is GRANTED and the initial decision is AFFIRMED with respect to all appellants except for appellant Burns and REVERSED with respect to apellant Burns. The agency is ORDERED to cancel appellant Burns' removal and to reinstate him in accordance with the findings made above.

Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this Order shall

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[5]Further, the Board finds that Burns' failure to mention the lack of leave cancellation in his August 12 conversation with the chief is not inconsistent with our findings above. *See McPartland v. Department of Transportation,* 13 MSPB 155 (1983) (holding that effective cancellation of leave requires notification to the appellant.)

be made to the Dallas Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in these appeals.

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:
ROBERT E. TAYLOR,
WASHINGTON, D.C.

APPENDIX A

Stephen P. Alex	DA075281F1329
Edward G. Gowler, Jr.	DA075281F1348
Gary O. Hill	DA075281F1331
Richard M. Hoover	DA075281F1328
Dennis Lynn Hunter	DA075281F1360
Raymond Irizarry	DA075281F1354
Dallas G. Judkins	DA075281F1340
Elmo E. Keirsey	DA075281F1341
Modesto Lara	DA075281F1361
Jimmy E. Mattair	DA075281F1355
Ralph E. Montgomery	DA075281F1332
John M. Neil, III	DA075281F1338
Mark William Owen	DA075281F1363
David A. Stewart	DA075281F1339
Robert N. Taylor	DA075281F1336
Robert Gary Whealton	DA075281F1359
Melvin D. Wolfe	DA075281F1356
David R. Burns	DA075281F0890
Neil Stephen Moody	DA075281F0891
Joseph Sakso	DA075281F0895
Linda Salamon	DA075281F0889
Edward R. Stout	DA075281F0887
Carolyn S. Novick	DA075281F1607
Bobby L. Schimelpfening	DA075281F1609
Richardo R. Garza	DA075281F1592
Sandra J. Garza	DA075281F1493
Joseph D. Knight	DA075281F1595
Danny R. Sims	DA075281F1600
Terry Michael Smith	DA075281F1584
Ronald L. Artis	DA075281F1403
Roxanne M. Bassett	DA075281F1456
Tony Sales Boykin	DA075281F1489
Allen J. Braden	DA075281F1565

Carl R. Cartwright	DA075281F1395
Donald Joseph Clark	DA075281F1425
Dennis Lee Cook	DA075281F1490
Jack Thomas Dempsey	DA075281F1322
Richard Joseph Dennis	DA075281F1492
Harold J. Des Vignes	DA075281F1430
William Hurst Dudley, Jr.	DA075281F1323
Stephen M. Dunn	DA075281F1540
Edward Dupaty	DA075281F1408
Darryl Lee Eitel	DA075281F1431
Patrick L. Ellis	DA075281F1433
Charles Edward Fisbeck	DA075281F1393
Thomas Edward Fitzpatrick	DA075281F1560
Sammy C. Flanary	DA075281F1434
Alfred Fontes	DA075281F1379
Sandra K. Garcia	DA075281F1493
Gary D. George	DA075281F1367
Joel B. Goodwin	DA075281F1495
Loretta Gutshall	DA075281F1497
Gerald Bruce Hall	DA075281F1567
Leslie F. Hall	DA075281F1568
Bruce A. Hamous	DA075281F1569
John R. Harris	DA075281F1502
William B. Harvey	DA075281F1578
Alan James Hay	DA075281F1410
Julian Andrew Hayes, Jr.	DA075281F1438
Rex M. Henderson	DA075281F1439
Frederick C. Herbst	DA075281F1441
Charles D. Hilburn	DA075281F1442
Samuel Lamar Hornsby	DA075281F1471
Thomas W. Humphries	DA075281F1371
Louis D. Hymer	DA075281F1444
Kenneth K. S. Inn	DA075281F1505
James H. Jackson	DA075281F1506
Albert Lee James	DA075281F1413

Joe Carroll Johnson	DA075281F1507
George W. Johnston	DA075281F1508
Frank Juarez	DA075281F1327
James A. Kerby	DA075281F1369
Robert Caryle Kingan	DA075281F1473
Richard F. Klinger	DA075281F1510
George Martin Knierim, Jr.	DA075281F1511
Francis J. Koch	DA075281F1561
Thomas Edward Lawson	DA075281F1514
Ellis Monroe Lee	DA075281F1447
Jean Loden	DA075281F1448
Ray Long	DA075281F1515
Gwin M. McIlwain	DA075281F1548
Melvin D. Miles	DA075281F1477
Russell Wayne Miller	DA075281F1416
Shirley Wayne Miller	DA075281F1519
Howard Earl Mixon	DA075281F1450
Garland Dale Morse	DA075281F1522
Roy E. Noble	DA075281F1524
Wayne J. Norris	DA075281F1400
Billy Dale Petty	DA075281F1549
Wayne Cedric Phillips	DA075281F1527
John Robert Ragsdal	DA075281F1563
Alan R. Ramsey	DA075281F1452
Donald A. Robinson, Jr.	DA075281F1479
Tom W. Schooler	DA075281F1574
Kenneth A. Schrader	DA075281F1529
Jay W. Schwab	DA075281F1480
Richard Keith Seirer	DA075281F1551
Eric R. Swarts	DA075281F1453
Clyde Peter Templet, Jr.	DA075281F1533
Arthur Joseph Tessimond, Jr.	DA075281F1483

Appendix I—Excerpts From Solerwitz's Brief of March 21, 1985.

BRIEF FOR PETITIONER

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HAROLD J. DES VIGNES,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1111

Appeal From the Merit Systems Protection Board.

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Overall, the appellant contends that the MSPB decision was arbitrary and capricious, not supported by substantial evidence, based upon an erroneous interpretation of the law, and unconstitutional.

I. Constitutional Error.

The petitioner asserts that his removal proceedings offended the United States Constitution. The Fifth Amendment was not respected in the process. The agency attempted to remove the petitioner by following an inapposite example at the implicit invitation of this Court in "lead cases" selected by it, a method that cannot account for the natural and crucial uniqueness of an individual controller's case.

Furthermore, due process of law under the Fifth Amendment is substantively denied, the petitioner's Fifth Amendment right to avoid self-incrimination is violated, and freedoms of speech and assembly under the First Amendment are abrogated.

A. The Lead Case Method Denies Due Process.

The selection by no apparent method of "lead cases" by this Court for treatment as precedent evaluation of the issues many air traffic controllers are presenting appeared to be a creative move to simplify the upcoming cases and give direction to the MSPB. All the petitioners and their counsel would doubtless welcome a streamlined achievement of justice. Unfortunately, the Court's efforts have not been able to

In addition, there is a useful analogy to be drawn with the cases involving a need for hearing before judicial steps are taken. *See, e.g., Cleveland Board of Education v. Loudermill,* ____ U.S. ____ (No. 83-1362, March 19,

1985) (voiding summary dismissal from employment), *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (requiring hearing before wage garnishment), and *Fuentes v. Shevin,* 407 U.S. 67 (1972) (regulating summary repossessions of property). In the instant matter, petitioners were immediately, in fact precipitously, fired before any hearing. It would not be in the interests of justice for them to face a situation, now that they have reached the Federal Circuit, in which the Circuit appears to give less than full consideration to their claims because of the adoption of the lead case methodology.

Incidentally, before closing the constitutional arguments, it should be noted that the due process clause is not the only source of petitioner's reliance on access to the courts. The differential treatment of lead controllers and non-lead controllers certainly raises equal protection concerns, and access to courts is clearly a fundamental right which would trigger a strict-scrutiny review. And the privileges and immunities clause, though not quoted often in recent years, is a support of the right of access to courts, as was seen in *Corfield v. Coryell,* 6 Fed. Cas. 546, 551-2 (No. 3230) (C.C.E.D. Pa. 1825), where it was stated that the right

B. Consolidation of the Petitioner's Hearing Obstructs His Right to a Fair Hearing.

It is well settled that proper parties, and only proper parties, may participate in an adjudication. In any individual dispute, due process of law, as guaranteed by the Fifth Amendment, demands the exclusion of distracting peripheral matter that may pertain to another dispute bu that will contaminate the instant one. Even the official allegations smack of guilt by association, and hope at least to establish that, because many controllers aggregately

committed many of the acts accused, all the controllers are likely guilty.

Garber v. Randell, 477 F.2d 711 (2d Cir. 1973), states the rule by which consolidation of cases must be judged. There, numerous aggrieved sued 58 defendants despite gross discrepancy between the number of claims lodged against most defendants and those filed against defendant-appellant. Although the appeals from the district court's order of consolidation and its denial of defendant-appellant's motion for severance were interlocutory, the Circuit found the orders appealable:

> We have recognized that consolidation . . . may benefit both the court and the parties if possible . . . . However, where the claims against, or defenses of, some parties are substantially different from those of others, some may be prejudiced by consolidation . . .

id., 777 F.2d at 714. The consolidation is permissible only by "determination in *each* case as to whether the benefits from consolidation will outweigh the prejudice to individual parties" (emphasis added).

The instant case lacks any such history of case-by-case evaluation for prejudice. It has been determined that this petitioner's case must be decided separately, and yet no rationale is offered to excuse consolidation of the hearing. And the agency has suggested no reason why the fact that some other accused controllers happened to work in the petitioner's region should so affect his guilt or innocence. This Court should follow the Second Circuit respecting the teaching of *MacAlister v. Guterma,* 263 F.2d 65 (2d Cir. 1958):

> "That decision drew the line between an order which merely requires the parties, in the interest of avoiding needless duplicative expenditure of time and money, to join in common pretrial discovery and preparation and an order which goes beyond these permissible objectives to deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result."

Garber, supra, 477 F.2d at 716.

In a dispute like *Garber* among stockholders and financial institutions, centering on the same set of misleading financial statements and estimates throughout, there was not present the variation among individual parties that we point out today. With the dismissal of an air traffic controller at issue, the agency concedes that the individual facts to be weighed: specific duty slots, particular days on approved leave, exact times participating in informational leafletting, precise dates of receipt of notices, and individual attempts to build a record in defense. The petitioner asserts that adverse facts are so muddled with facts concerning other controllers in the agency's arguments, and so sketchy when in fact concerning him, that the *Garber* problem of due process rights is greatly exacerbated.

Appendix J—Excerpts From Government's Brief Dated May 20, 1985.

BRIEF FOR RESPONDENT

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HAROLD J. DES VIGNES,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1111

Petition for Review of a Decision of the Merit Systems Protection Board.

Statement of the Issue.

Whether the Merit Systems Protection Board (MSPB or Board) correctly sustained the decision of the Federal Aviation Administration (FAA), Department of Trans-

portation (DOT), to remove petitioner from his position as an air traffic controller for his participation in an illegal strike against the United States and his absence from his position without authorization?

Statement of the Case.

I. *Nature of the Case*

Petitioner seeks review of a final order of the MSPB sustaining the decision of the FAA to remove him from his position

Summary of the Argument

The Board properly concluded that petitioner had failed to rebut the agency's proof of strike participation and therefore that the agency had proved the charges against petitioner by a preponderance of the evidence.

Argument.

I. Petitioner's Removal Was Effected Without Contravening Rights Afforded By The Constitution.

A. The Court's Decision to Suspend Proceedings In This Appeal Did Not Deny Due Process.

Petitioner devotes ten pages of his already overlong brief to his contention that the Court's decision to suspend proceedings in this case pending resolution of certain other cases offends due process. Yet, he cites not a single precedent that directly supports his attack upon this Court's ex-

ercise of its discretion to manage its docket. The suspension of proceedings was ordered by the Court at a time when five of the seven lead cases were still pending before the Board. The decision to await the Board's resolution of these cases was supported by the doctrine of primary jurisdiction[3] and the precedents of this Court,[4] as well as common sense. The Court had before it many appeals directly from decisions of presiding officials on issues not yet decided by the full Board. It would have been totally illogical for the Court, as an appellate tribunal, to undertake to resolve these issues prior to their final resolution by the forum below.

The concomitant decision to suspend proceedings in this appeal until this Court could rule on the lead cases was equally appropriate and supported by precedent. The "lead case" or "test case" procedure was frequently

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[3]Primary jurisdiction is a judicially developed rule which requires courts to defer in appropriate cases to determinations by specialized bodies such as the MSPB. *See, e.g., Far East Conference v. United States,* 342 U.S. 570, 574-75 (1952). The doctrine preserves uniformity of policy and statutory interpretation, *id.* at 574; makes agency expertise available to the courts as an aid in reaching more informed decision, *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 306 (1973); avoids imposing inconsistent obligations on parties, *Texas and Pacific Railway Co. v. Abilene Cotton-Oil Co.,* 204 U.S. 426, 440-41 (1907); and promotes judicial economy. *Ricci v. Chicago Mercantile Exchange,* 409 U.S. at 306.

[4]The Court of Claims frequently noted and deferred to the expertise of administrative tribunals. *See, e.g., Paul E. Lehman, Inc. v. United States,* 673 F.2d 352, 355 (Ct. Cl. 1982); *Sea-Land Service, Inc. v. United States,* 493 F.2d 1357, 1368 (Ct. Cl.), *cert. denied,* 419 U.S. 840 (1974); *Hegeman-Harris & Co. v. United States,* 440 F.2d 1009 (Ct. Cl. 1971). While these cases concerned deference to various boards of contract appeals on contract questions, the Court of Claims has also held that the MSPB is the forum which should consider civilian pay questions in the first instance. *See, e.g., Martin v. United States,* 227 Ct. Cl. 742 (1981); *Hong-Yee Chiu v. United States,* 229 Ct. Cl. 664 (1981).

utilized by the Court of Claims in adjudicating claims by federal employees:

> The test case, brought by one or a few plaintiffs, has been the traditional method of litigating rights of Government employees in this court. We see no reason why the method is not sufficient here.

Clincher v. United States, 499 F.2d 1250, 1253 (Ct. Cl. 1974). The "test case" procedure was also utilized by the Court of Claims in other actions, such as military pay cases, *see, e.g., Crane v. United States,* 538 F.2d 875 (Ct. Cl. 1976) (" 'test case' resolution of the legal issues common to members of the 'dependent' class will provide adequate relief by permitting potential plaintiffs to proceed directly to trial"); and tax cases, *see, e.g., Anderson Snapper Boats, Inc. v. United States,* 215 Ct. Cl. 998, 999 (1977).[5]

Not one of the cases cited by petitioner even suggests that the lead case approach to litigation offends due process. While it is true that the Supreme Court has recognized that access to the courts is a fundamental right, nothing in the cases cited suggests that the courts may not manage their dockets in a manner which prevents duplicative and unnecessary litigation. Petitioner's assertion that the lead case approach violates 28 U.S.C. § 2072 is based upon his conclusory assertion that he will be denied "a proper hearing on their substantive claims." There is absolutely

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[5]The Claims Court has continued this practice. For example, the Claims Court suspended proceedings in various military pay actions pending a final decision in *Duncan, et al. v. United States,* Cl. Ct. No. 493-77, and related cases, on the ground that decisions in the *Duncan* cases might prove dispositive of the issues in the other cases. *See Alsup v. United States,* Cl. Ct. No. 528-81C, and related cases (January 24, 1983); *Jacobs v. United States,* Cl. Ct. No. 361-82C (January 3, 1983).

nothing which would suggest that such an assertion has any basis in fact. Finally, petitioner's attack on the lead case approach is totally undermined by his assertion that the decisions in the lead cases are immaterial to his appeal and rest upon distinguishable fact situations. To the extent his contentions in this regard are true, they are unaffected by the Court's decision to suspend related cases pending decisions in the lead cases, and he has absolutely no ground upon which to complain.

B. Petitioner's Contention That The Consolidation Of His Appeal Before The Board With Other Appeals Was Constitutionally Impermissible Is Frivolous.

Petitioner's contention that the Board erred in consolidating his appeal with others is so baseless and unsupported by citation to the record as to be entirely frivolous.[6] An administrative agency's docket management is a matter within the agency's discretion. *REA Express, Inc. v. United States,* 568 F.2d 940 (2d Cir. 1977), *cert. denied,* 435 U.S. 923 (1978). An MSPB presiding official has authority to consolidate appeals when he believes consolidation "could result in the appeals being processed more expeditiously and would not adversely affect any

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[6]Petitioner was included in the consolidation which was captioned at the hearing level *Richard W. Block, et al. v. Department of Transportation, FAA,* Docket No. DA075281F0892 (MSPB Jan. 3, 1981). Before the full Board this consolidation was captioned *Stephen P. Alex, et al. v. Department of Transportation, FAA,* Docket No. DA075281F1329 (MSPB Oct. 3, 1983).

Appendix K—Excerpts From Petitioner's Reply Brief Filed With FCCA.

REPLY BRIEF FOR PETITIONER

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HAROLD J. DES VIGNES,

Petitioners,

against

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1111

Appeal From the Merit Systems Protection Board.

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I. Use of the lead case method was unfair to petitioner as the lead case method was used here in an inappropriate fashion.

As discussed in Petitioner's original brief, the lead case method denies Petitioner adequate access to the Court. The purpose of lead cases is to resolve legal questions. However, the effect of the lead cases will be to raise a factual presumption adverse to Petitioner's claim. So to speak, Petitioner already has one strike against him before his hearing even commences.

Normally "lead" or "test" cases are used in cases hinging on a purely legal issue, typically whether a general class of plaintiffs or petitioners has a cause of action at all. Purely legal disputes are well suited for test cases since they involve only questions that can be decided on precedent, public policy and equity, with no individual facts to be considered. See *Stark v. Wickard,* 321 U.S. 288 (1944), which used the test case method to determine if milk producers had a cause of action under a certain act. Moreover, in *Stark* the circumstances of the individual milk producers were virtually identical, unlike the instant case, where each air traffic controller has a different case to present to the Court for determination of the application of the law to specific facts. Courts have also been extremely cautious when applying test cases, to limit their after-effects. See *United States v. Commercial Credit Corporation,* 242 F.2d 57 (5th Cir. 1957).

The test case method must be used with caution as its after-effects may unjustly stigmatize a subsequent petitioner. Each Petitioner is entitled to have his case decided on his facts and not on the facts of the test case.

II. Respondent's citations and argument regarding lead cases are totally inapposite.

Respondent, in its brief, accuses Petitioner of citing little precedent in support of Petitioner's lead case argument. (The lead case method is rarely used because of inherent due process problems.) However, Respondent's citations are unrelated to the instant case as well as inaccurate.

On page 5 of Respondent's brief it cites *Crone v. United States,* 538 F.2d 875 (Ct. Cl. 1976), a U.S. Court of Claims case. This case is totally distinguishable from the Petitioner's case since *Crone* does not involve the loss of an interest nearly as quantifiable as that in the instant case. *Crone* involves the status of Vietnam MIA's and whether or not their deaths are listed as official. *Crone,* unlike our case, is a declaratory judgment case focusing solely on the resolution of a legal question common to a class, with very few individual facts available to be considered.

The remainder of Respondent's citations are also U.S. Court of Claims cases. Moreover, the fact patterns in these remaining cases indicate that the test case method was appropriate because all of the Petitioners in those cases had virtually identical circumstances and the primary issue decided in the test case did not involve as great a loss of rights as there was in the instant case. For example, in *Anderson v. United States,* 215 Ct. Cl. 988, (1977), a test case, the issue is declaratory and focuses on whether fishermen are employees or independent contractors, so it can be determined whether social security and federal taxes should be deducted from their salaries. Once more a

test case is used to resolve a legal question with virtually no individual facts to be considered.

Lastly, Respondent says Petitioner's lead case argument is undermined, as the lead cases will be considered irrelevant since Petitioner has a distinguishable fact situation. This is simply not true because, regardless of the individuality of Petitioner's claim, a lead case decision adverse to an individual petitioner raises a factual presumption against the individual petitioner.

III. Consolidation was inappropriate in petitioner's case.

Respondent attempts to dismiss Petitioner's consolidation argument as "boilerplate" and "frivolous". However, Respondent has no response to Petitioner's citing of *Garber v. Randell,* 477 F.2d 711 (2d Cir. 1973) (Petitioner's brief at 17). Instead, Respondent cites an irrelevant case about the rights of a trustee in bankruptcy which says an agency is free to manage its own dockets. *REA Express v. United States,* 568 F.2d 940 (2d Cir. 1977). By reading *REA Express,* one can clearly see that the Trustee's legal question was nowhere nearly as fundamental and crucial as the permanent employment rights at stake in the air traffic controller cases. Consolidation may have been appropriate in *REA Express.* Consolidation was not appropriate in the air traffic controller cases. By reading *REA Express,* one can clearly recognize that the individual facts of the air traffic controllers were much more diverse and unique than the cases consolidated in *REA Express.*

In Re Air Crash Disaster at the Florida Everglades, 549 F.2d 1006 (Respondent's brief at 7), was the ideal case for consolidation since no plaintiff can possibly prove any-

thing different on liability than the next. It was in the spirit of judicial economy to consolidate the *Everglades Air Crash Case.* Lastly, in *DeFiguereido v. TWA,* 55 F.R.D. 44 (S.D.N.Y. 1971), the individual fact situations in the consolidation case were virtually identical; therefore consolidation was appropriate.

Appendix L—Analysis of Cases Involving Sanctions for Improper Conduct During Litigation.

CITATION	STANDARD	SANCTIONS IMPOSED
	FIRST CIRCUIT	
NLRB v. Smith & Wesson 424 F.2d 1072 (1st Cir. 1970)	Amount of evidence supporting determination appealed from	Yes
Griffin Wellpoint v. Munro-Lamptrath, Inc. 269 F.2d 64 (1st Cir. 1959)	"Tricks of Advocacy" Miscitation in Brief"	Yes
	SECOND CIRCUIT	
Bankers Trust v. Publicker Industries 641 F.2d 1361 (2d Cir. 1981)	Delay	Yes
Fluoro Electric v. Branford Associates 489 F.2d 320 (2d Cir. 1973)	Repeated appeal of same issue	Yes
State of West Virginia v. Chas. Pfizer 440 F.2d 1079 (2d Cir. 1971)	Bad Faith	No
	THIRD CIRCUIT	
Ginsberg v. Stern 295 F.2d 698 (3d Cir. 1961)	False & Scandalous Matter in Brief	Yes

United States v. Montgomery 269 F.2d (3d Cir. 1959)	Delay	No
	FOURTH CIRCUIT	
Eaton v. New Haven City Bd. of Ed. 459 F.2d 684 (4th Cir. 1972)	Delay; Relitigation of Issue	Yes
	FIFTH CIRCUIT	
Harris v. Plastics Mfg. Co. 617 F.2d 438 (5th Cir. 1980)	No colorable legal or factual basis for Appeal	Yes
	SEVENTH CIRCUIT	
Ruderer v. Fines 614 F.2d 1128 (7th Cir. 1980)	Bad faith; frivolous; malicious; totally devoid of any semblance of colorable merit	Yes
	NINTH CIRCUIT	
Rederi A/B Saya v. S.S. Grand Grace 369 F.2d 159 (9th Cir. 1966)	Delay	No
Jaeger v. Canadian Bank of Commerce 327 F.2d 743 (1964)	Assertion of Unique Claim	No
Lowe v. Willacy 239 F.2d 179 (9th Cir. 1956)	Assertion of claim Invalid on its face	Yes

L3

TENTH CIRCUIT

United States v. Rayco 616 F.2d 462 (10th Cir. 1980)	"Tricks of Advocacy" Mislead the Court	Yes

FEDERAL CIRCUIT

Griessenauer v. Dept. of Energy 754 F.2d 361 (Fed. Cir. 1985)	Lack of merit in arguments on appeal	Yes
Robinson v. FAA 769 F.2d 1556 (Fed. Cir. 1985)	Negative comments about Presiding Official	Yes
Syran v. MSPB 765 F.2d 1099 (Fed. Cir. 1985)	No possible basis for reversing MSPB's decision	Yes

D.C. CIRCUIT

Furbee v. Vantage Press 464 F.2d 835 (D.C. Cir. 1972)	Repeated Appeal of Same Issue	Yes